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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN R. O'NEILL, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a corporation may be considered the "alter ego" of a successor corporation absent any common ownership between the two corporations?

RULE 14.1(b) AND RULE 29.1 STATEMENTS

Parties Below: In addition to Edwin R. O'Neill and the National Labor Relations Board, parties to the proceeding in the court below included: O'Neill, Ltd., Food Equipment Leasing Company, and Amalgamated Meat Co.—petitioners in this Court—as well as Fresno Beef Processors, Inc., Don Turner Corporation, Sierra Pacific Meat Company, Inc., J & E Transport, Inc., United Food and Commercial Workers Union, Local No. 126, AFL-CIO, and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO.

Subsidiaries: Petitioners O'Neill, Ltd., Food Equipment Leasing Company, and Amalgamated Meat Co. have no subsidiaries other than wholly-owned subsidiaries. O'Neill, Ltd. is the parent of Food Equipment Leasing Company, which is, in turn, the parent of Amalgamated Meat Co. O'Neill, Ltd. has no corporate parent.

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PETITION FOR WRIT OF CERTIORARI

Edwin R. O'Neill ("O'Neill"), an individual, and O'Neill, Ltd., Food Equipment Leasing Company, and Amalgamated Meat Co. (formerly known as O'Neill Meat Company) (collectively, the "O'Neill Companies"), respectfully petition this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. Enforcing two orders of the National Labor Relations Board ("NLRB" or the "Board"), the Ninth Circuit held that the O'Neill Companies are the alter egos of four distinct successor companies which took over the operation of a meat plant previously operated by O'Neill Meat Company, notwithstanding the complete lack of

any common ownership between the two groups of companies.

Petitioners submit that the decision of the Ninth Circuit is directly contrary to this Court's statement that a finding of alter ego status turns on the absence of any substantial change in ownership between the predecessor and successor corporations. In addition, the Ninth Circuit's decision in this case conflicts with decisions of other lower federal courts. This case presents an opportunity for this Court to resolve the substantial confusion that exists over the proper application of the alter ego doctrine. Resolution of this question is of substantial importance to the business community. Unchecked alter ego liability would substantially impede the purchase of assets of financially troubled businesses.

OPINIONS AND ORDERS BELOW

The NLRB's May 31, 1988 orders affirming the administrative law judge's rulings, findings, and conclusions, and adopting the recommended orders as modified, are reported at 288 NLRB 1354 and 288 NLRB 1394 and are reproduced at Appendix ("App.") 3a-157a.

The June 5, 1992 decision of the United States Court of Appeals for the Ninth Circuit enforcing the orders of the NLRB is reported at 965 F.2d 1522 and is reproduced at App. 158a-175a. That court's June 24, 1992 order granting petitioners' Motion for Extension of Time to file a Petition for Rehearing and Suggestion for Rehearing en banc is unreported and reproduced at App. 176a. The Ninth Circuit's November 4, 1992 order granting petitioners' Motion for leave to file a revised Petition for Rehearing and

Suggestion for Rehearing en banc is unreported and reproduced at App. 177a.

The December 8, 1992 order of the Ninth Circuit denying petitioners' Petition for Rehearing and Suggestion for Rehearing en banc is unreported and reproduced at App. 178a-179a.

JURISDICTION

The Court of Appeals issued its decision on June 5, 1992. That court granted petitioners' Motion for Extension of Time to file a Petition for Rehearing and Suggestion for Rehearing en banc on June 24, 1992, and granted petitioners' Motion for leave to file a revised Petition for Rehearing and Suggestion for Rehearing en banc on November 4, 1992. On December 8, 1992, the court denied petitioners' Petition for Rehearing and Suggestion for Rehearing en banc.

This petition is being filed within the time permitted by the Rules of this Court as extended by the February 24, 1993 order of Justice O'Connor (A-636). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, provides in pertinent part:

(a) Unfair labor practices by employer.

It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

A. Statement of the Facts

The O'Neill Meat Co. was founded in 1949 and operated, *inter alia*, a meat processing facility in Fresno, California. This case arose out of the closing of that facility in 1977. Petitioner Edwin R. O'Neill owned ninety-one percent of the outstanding shares of O'Neill Meat Co. In the mid-1970s, the company began to experience serious financial difficulties. In 1976, the company attempted to renegotiate its collective bargaining contracts with the Butchers Union ("Butchers") and the Teamsters Union ("Teamsters"). Although concessions were sought from both unions, they were not obtained. By the fall of 1976, a new, three-year agreement was signed which provided for yearly increases in wage levels. In 1976, O'Neill Meat Co. lost more than $730,000.

In 1977, Mr. O'Neill attempted to take advantage of favorable tax treatment by reorganizing O'Neill Meat Co. The company changed its name to Food Equipment Leasing Company ("FELC"), and transferred the operation of the meat plant to a wholly-

owned subsidiary of FELC, called O'Neill Meat Company ("OMC"), which leased the plant and equipment from FELC. In addition, ninety-one percent of FELC's stock was transferred to O'Neill, Ltd., which served as a holding company and performed administrative and bookkeeping services for OMC. Mr. O'Neill owned ninety-four percent of the stock in O'Neill, Ltd., and thus retained substantially the same ownership interest in the facility as he had under the prior organization.[1] This organization is represented on the chart appearing at App. 1a.

Despite the reorganization, the O'Neill Companies continued to lose money. In 1977, OMC suffered a loss of over $650,000. As a result of these heavy losses, OMC announced to its employees on October 26, 1977 that it intended to close the plant effective November 18, 1977. On November 8, 1977, Mr. O'Neill met with the Butchers' representative, James Whiting ("Whiting"), to discuss possible wage concessions, but they were unable to reach an agreement. Consequently, on November 18, 1977, slaughtering of cattle ceased and most employees were laid off. By November 23, all employees had been laid off.

In October 1977, Mr. O'Neill had mentioned the possibility that the plant would close to L.J. Maxey, who operated King-O-Meats, an area meat wholesaler that purchased some of its supply from OMC. Mr. Maxey expressed an interest in buying or leasing the meat plant to start a "custom kill" slaughtering op-

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[1] These three companies—O'Neill, Ltd., FELC, and OMC--will be referred to as the "O'Neill Companies."

eration.[2] Mr. Maxey and his son subsequently formed Fresno Beef Packers ("FBP"), each owning fifty percent of FBP's stock. App. 43a-44a. Mr. O'Neill had no ownership interest in FBP. On December 1, 1977, FBP agreed to lease the OMC plant and equipment from FELC under the same terms that OMC had leased them. *Id.* at 7a, 45a.

Mr. Maxey approached several individuals, and eventually persuaded Don Turner to form a second corporation, Don Turner Corporation ("DTC"), to act as a labor contractor and provide labor and personnel services to FBP. Mr. Turner and his wife were the sole stockholders of DTC. *Id.* at 43a-44a. Eric Garrett, who worked as an independent meat broker in the Sacramento area, relocated to Fresno and formed another company, Sierra Pacific Meats ("SPM"), to act as a meat broker. Mr. Garrett was SPM's president and sole owner. *Id.* at 43a. SPM obtained cattle on consignment from livestock companies to be processed by FBP, and brokered processed meat and carcasses to wholesalers and retailers. Mr. O'Neill had no ownership interest in either DTC or SPM.

Finally, upon learning that OMC was ceasing its operations, John Abatti, who had operated a trucking company that performed substantial services for OMC, formed a new company, J & E Transport, Inc. ("JET"). Mr. Abatti and his wife were the sole stockholders and officers of JET. *Id.* JET leased refrigerated trucks from FELC and entered into agreements with SPM to transport meat to SPM's

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[2] "In the industry [a custom kill facility] means that the plant operator slaughters cattle as a service for others on a fixed-fee basis." App. 45a.

customers. Again, Mr. O'Neill had no ownership interest in JET.

On December 8, 1977, the Butchers' representatives and OMC management, including Mr. O'Neill, met at the offices of OMC's attorney to hold further discussions concerning the closing of the plant. Mr. O'Neill's attorney stated that OMC might reopen the plant, but only if the Butchers made certain concessions. Mr. Whiting, the Butchers' representative, thereafter tried to persuade the Butchers' other representatives to authorize a modification of the collective bargaining agreement, but they refused.

On December 12, 1977, FBP began its operations at the meat plant. In addition to leasing the plant and equipment from FELC, FBP also entered into a service agreement with O'Neill, Ltd. for the provision of certain accounting and bookkeeping services. *Id.* at 48a. SPM and DTC entered into similar agreements with O'Neill, Ltd. *Id.* Upon FBP's commencement of its operations, DTC, SPM and JET began providing services to FBP. Each new corporation took over a portion of OMC's former business. *Id.* at 161a. The post-December 12, 1977 operations are represented on the chart at App. 2a. The new operations were not financially successful and on February 18, 1981, the meat plant permanently ceased operations. *Id.* at 145a.

On January 19, 1978, after the new companies commenced their operations, Mr. O'Neill and his representatives had another meeting with the Butchers' representatives regarding OMC's decision to cease its operations and the effects of the closing on unit employees. On the same date, the Butchers filed a grievance against OMC over the closing of the facility. *Id.*

at 41a n.16. On April 12, 1978, the Butchers filed unfair labor practice charges against OMC. The Teamsters followed suit on May 11, 1978. *Id.* at 162a & n.5. After an investigation by the NLRB, the charges of both unions were dismissed. The Butchers appealed the dismissal; the Teamsters did not. *Id.*

On November 21, the NLRB's Regional Director notified the parties that the Butchers' charges had been reinstated on the basis of additional evidence, and on January 18, 1979, notified the parties that the Teamsters' charges had also been reinstated. On April 27, 1979, the Regional Director issued an amended complaint consolidating the Teamsters' and the Butchers' charges. *Id.* at 162a-163a.

B. The Proceedings Below

Following a thirty-day hearing in early 1980, Administrative Law Judge William Schmidt (the "ALJ") issued an initial decision on March 30, 1982. App. 3a. Despite recognizing that "[t]he evidence shows that O'Neill had no ownership interest in the four corporate entities that resumed the operation of the meat plant on December 12, and was not an officer, director, or employee of any of these corporations," *id.* at 43a, the ALJ nonetheless determined that the four new corporations that had taken over OMC's operations were the alter egos of the O'Neill Companies that ran the plant prior to November 18, 1977. *Id.* at 84a. Thus, the ALJ found that the successor corporations had committed unfair labor practices by resuming operations in December 1977 without applying the terms and conditions of the collective bargaining agreements the O'Neill Companies had entered into with the unions in 1976. *Id.* at 100a-101a. Finally, the ALJ pierced

the corporate veil to hold Edwin R. O'Neill individually liable for the unfair labor practices. *Id.* at 103a.[3]

On May 31, 1988, the NLRB adopted the ALJ's findings that the four successor corporations were the alter egos of the O'Neill Companies that ran the plant prior to November 18, 1977, and that Mr. O'Neill was individually liable for their unfair labor practices. *Id.* at 9a.[4]

On June 5, 1992, the Ninth Circuit issued an opinion enforcing the NLRB's orders. Although acknowledging that "it is undisputed that O'Neill did not own any of the new companies and did not serve as an officer for any of them," the court nevertheless affirmed the Board's finding that the successor companies were the alter egos of the O'Neill Companies. *Id.* at 171a-172a.

REASON FOR GRANTING THE PETITION

THE CIRCUITS ARE IN CONFLICT OVER WHETHER A SUCCESSOR CORPORATION MAY BE CONSIDERED THE ALTER EGO OF A PREDECESSOR CORPORATION ABSENT SUBSTANTIALLY IDENTICAL OWNERSHIP

Section 8(a) of the National Labor Relations Act ("NLRA," or the "Act"), 29 U.S.C. § 158(a) (1988),

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[3] On August 1, 1985, the NLRB remanded the case to the ALJ to determine whether the complaint should be dismissed as barred by a six-month statute of limitations. The ALJ issued a supplemental decision on April 30, 1986, holding that the six-month statute of limitations had been tolled. App. 113a-133a.

[4] On April 16, 1982, another ALJ issued a decision finding that petitioners committed additional unfair labor practices when FBP permanently closed the meat plant in 1981. App. 136a-137a. This decision was affirmed by the NLRB on May 31, 1988, *id.* at 134a, but is not at issue in this Petition.

prohibits "employers" from engaging in "unfair labor practices." Normally, the question of who is an "employer" is not difficult: it is the individual, partnership or corporation that employs the workers in question. However, under certain limited circumstances when one entity succeeds another, the successor and the predecessor may be considered to be the same "employer." In such instances, the successor corporation is the "alter ego" of the predecessor, and is therefore bound by the predecessor's collective bargaining obligations. As shown below, the key to finding that a successor and a predecessor are "alter egos" is the presence of substantially identical ownership.

This Court first suggested the existence of an alter ego doctrine under the NLRA in *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942). There, the Court drew a distinction between "a *bona fide* discontinuance" involving "a true change of ownership" and a mere "disguised continuance of the old employer." *Id.* at 106. The former would relieve the successor of the obligations of the predecessor, while the latter would not because the successor is merely the "alter ego" of the predecessor.

In *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249 (1974), this Court further refined the alter ego doctrine. There, several predecessor corporations had owned and operated a Howard Johnson restaurant and motor lodge as franchisees of the Howard Johnson Co. The predecessor corporations had entered into collective bargaining agreements with the union representing their employees. These agreements specifically provided that "they would be binding upon the employer's 'successors, assigns, purchasers, lessees, or transferees.' " *Id.* at 251. The predecessor

corporations subsequently agreed to turn over the operation of the facilities to Howard Johnson Co. and to sell all personal property used in the business to Howard Johnson Co. The predecessors retained ownership of the real property, however, which they leased to Howard Johnson Co. In the agreement, Howard Johnson Co. expressly declined to assume the predecessors' collective bargaining obligations. *Id.* Howard Johnson Co. took over operation of the facilities and the union filed suit, alleging that the company violated federal labor laws by operating the facilities without hiring all of the predecessor's employees.

This Court held that the successor had the right "to select and hire its own independent work force." *Id.* at 259. Significantly, the Court found that there was no basis for finding that Howard Johnson Co. was the alter ego of the franchisee:

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve *a mere technical change* in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, *without any substantial change in ownership or management*.

Id. at 259 n.5 (emphasis added). In such circumstances, "the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor." *Id.* Conversely, it follows from the holding in *Howard Johnson* that when a "substantial

change in ownership" takes place, the successor cannot be subjected to such obligations. Rather, as *Howard Johnson* shows, pursuant to an agreement to purchase or lease assets, a separately-owned successor may take over the business of the predecessor without incurring the predecessor's obligations, whether under the labor laws or otherwise.

Since this Court's decision in *Howard Johnson*, the lower federal courts have issued conflicting decisions as to whether alter ego status can be found in the absence of substantially identical ownership of predecessor and successor corporations. These decisions have led to contradictory results in similar cases and to substantial confusion concerning the proper test for determining alter ego status in the federal labor law context.

Both the D.C. and the Ninth Circuits have rendered decisions explicitly adhering to this Court's instruction in *Howard Johnson* that without any substantial change in ownership, alter ego liability cannot be imposed. In addition, the Eighth Circuit has strongly suggested that a sufficient degree of common ownership is necessary to support the imposition of alter ego liability. For example, in *Amalgamated Meat Cutters v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980), the D.C. Circuit held that a finding of alter ego status is not warranted absent " 'substantially identical' ownership" of the predecessor and successor corporations. That case arose out of the closing of a supermarket, known as Morton's I.G.A., owned by Clinton Foods, Inc. Sam Morton owned approximately 18% of the shares of Clinton Foods, while the remaining 82% was owned by Blackburn Foods, Inc., a corporation whose shares were owned by five individual investors. Mr. Morton

was the president of Clinton Foods and manager of the store. "He was responsible for the day to day operation of the store and for its labor relations, including the negotiation of collective bargaining agreements and the hiring, scheduling, disciplining, and firing of employees." *Id.* at 225.

After the supermarket closed due to operating losses, "Morton wanted to continue operating the store." *Id.* at 226. Thus, Mr. Morton, along with his father-in-law and a friend, formed Sam & Ed's, Inc., secured a bank loan to purchase the assets of the store, and renamed the store Sam & Ed's I.G.A. Mr. Morton owned 30% of the shares in Sam & Ed's, with the prospect of increasing his share to 50% once the bank loan was repaid. "Morton's duties in Sam & Ed's remained basically the same as his previous duties with Clinton Foods. He was still store manager and still in charge of labor relations." *Id.* In reopening the store as Sam & Ed's I.G.A., Mr. Morton did not hire any former employees of Morton's I.G.A. who had been union members.

The NLRB rejected the union's assertion that Sam & Ed's should be treated as the alter ego of Clinton Foods, holding that "[a] finding of *alter ego* status requires, among other factors, the presence of 'substantially identical' ownership between two enterprises." *Clinton Foods, Inc.*, 240 NLRB 1246, 1246 n.2 (1979). In enforcing the Board's order, the D.C. Circuit adopted this analysis. Significantly, the court accepted the Board's findings that the two enterprises had " 'substantially identical' management, business purpose, operation, equipment, customers, and supervision," 663 F.2d at 226-27 (quoting *Crawford Door Sales Company, Inc.*, 226 NLRB 1144, 1144 (1976)), but re-

fused to find alter ego status on the ground that " '[t]he missing element in the instant case is, of course, ownership,' " *id.* at 227 (quoting *Clinton Foods, Inc.*, 240 NLRB at 1250).

As to this element, the D.C. Circuit reasoned that Mr. Morton's 18% ownership of the predecessor and his 30% ownership in the successor were "insufficient to support a conclusion that Clinton Foods and Sam & Ed's share a 'substantially identical' ownership." *Id.* Accordingly, the court concluded that "[t]he record establishes that the sale of the supermarket was not a 'paper transaction without meaningful impact on the ownership or operation of the enterprise.' " *Id.* (quoting *Howard Johnson Co.*, 417 U.S. at 259 n.5).[5]

Similarly, in *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147 (9th Cir. 1989), the Ninth Circuit held that "a threshold determination must be made in every alter ego case: whether both companies are substantially

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[5] A subsequent decision of the D.C. Circuit attempts to distinguish *Amalgamated Meat Cutters* and states that "common ownership is *not* an absolute prerequisite to a finding of alter ego status." *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1420 (D.C. Cir. 1984). This attempt is wholly unpersuasive given that the *Amalgamated Meat Cutters* court expressly stated that the *only* "missing element" in that case was "substantially identical ownership." In the D.C. Circuit, of course, the decision of one panel binds all future panels unless and until overruled *en banc* or by virtue of a so-called "*Irons* footnote," a method which "allow[s] the full court to resolve an apparent conflict between prior decisions in the context of a panel's consideration of a case and without further briefing and oral argument." *National Patent Dev. Corp. v. T.J. Smith & Nephew Ltd.*, 877 F.2d 1003, 1005 n.3 (D.C. Cir. 1989). The D.C. Circuit's decision in *Amalgamated Meat Cutters* has never been overruled and thus remains binding precedent in the D.C. Circuit.

owned and controlled by identical parties." *Id.* at 1150. In *Haley & Haley*, that threshold requirement was met because the companies in question were both owned by the same parties. *Id.*

In *NLRB v. Campbell-Harris Electric, Inc.*, 719 F.2d 292, 295-96 (8th Cir. 1983), the Eighth Circuit applied a similar standard. Although the court acknowledged that "lack of *identical* corporate ownership will not bar a finding of alter ego status," *id.* at 296 (emphasis added), it nonetheless affirmed the Board's imposition of alter ego liability on the basis of "substantially identical ownership." *Id.* According to the Eighth Circuit, the latter is "sufficient identity in ownership to evince an alter ego relationship." *Id.*

The Ninth Circuit's decision in this case, as well as a similar decision by the Third Circuit, conflict with both the alter ego analysis adopted by this Court in *Howard Johnson* and the decisions of the D.C. Circuit in *Amalgamated Meat Cutters* and the Eighth Circuit in *Campbell-Harris*.[6] As discussed above, in this case the Ninth Circuit stated that common ownership "need not be present" and held that the successor corporations—which took over operation of the meat plant following the O'Neill Companies' decision to cease op-

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[6] The decision in this case, as well as the Ninth Circuit's earlier decision in *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, 1035 (9th Cir. 1982), also conflict with the approach adopted by the Ninth Circuit in *Haley & Haley*. Petitioners sought rehearing and rehearing *en banc* in this case to resolve this intra-circuit conflict, but the Ninth Circuit denied the petition without opinion. *See* App. 178a-179a. This longstanding intra-circuit conflict is further evidence that guidance from this Court is necessary to resolve the substantial confusion among the lower courts concerning the proper contours of the alter ego doctrine.

erations—were the alter egos of the O'Neill Companies. App. 170a. The Ninth Circuit reached this conclusion despite its acknowledgment that "it is undisputed that *O'Neill did not own any of the new companies* and did not serve as an officer for any of them." *Id.* at 171a (emphasis added). In light of this undisputed fact, it follows *a fortiori* from *Howard Johnson* and *Amalgamated Meat Cutters* that the new companies and the O'Neill Companies cannot be considered "alter egos" of each other.

In lieu of common ownership, the Ninth Circuit based its decision solely on evidence of the "interrelation of operations" between the two groups of corporations and Mr. O'Neill's supposed "financial control" of the successor corporations.[7] In *NLRB v. Omnitest Inspection Services, Inc.*, 937 F.2d 112, 118 (3d Cir. 1991), the Third Circuit applied a similar standard and held that "substantial identity of formal ownership between two employers" may not be required to find that a successor is an alter ego, because the determination is based on the "sum total of the factors." *Id.*

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[7] The Ninth Circuit expressly declined to rely on either "centralized control of labor relations," App. 170a—which it characterized as the "single most important factor in the analysis," *id.*—or "common management." *Id.* Evidence of the former was ambiguous, while evidence of the latter did not "rise to the level of substantial evidence of control of the daily operations of the plant." *Id.* at 171a. In any event, as the D.C. Circuit has held, absent a finding of common ownership, neither of these other factors could suffice to support a finding of alter ego status. *See Amalgamated Meat Cutters*, 663 F.2d at 227 (although the court found common management and control of labor relations, the lack of common ownership precluded a finding of alter ego status).

This Court's decision in *Howard Johnson* and the D.C. Circuit's decision in *Amalgamated Meat Cutters* conclusively demonstrate that exclusive reliance on factors other than substantially identical ownership cannot suffice to establish alter ego status. For example, in *Howard Johnson*, the successor corporation had exercised substantial control over the predecessors' operation of the restaurant and motor lodge. As this Court explained, the predecessors' "operation of the enterprise as Howard Johnson's franchisee was subject to substantial restraints imposed by the franchise agreements on some aspects of the business." 417 U.S. at 259 n.5. Moreover, the operations of the predecessors and the successor were "intermingled" to the extent that the predecessors "retained ownership of the real property" used in the business and leased it to the successor. *Id.* at 251.

The *Howard Johnson* Court considered such "interrelation of operations" irrelevant to a finding of alter ego status. As this Court stated, "[t]here is not the slightest suggestion in this case that the sale of the restaurant and motor lodge by [the predecessor] to [the successor] was in any sense a paper transaction." *Id.* at 259 n.5. Rather, as the Court stressed, there was no basis in *Howard Johnson* for finding that "the successor corporation is the 'alter ego' of the predecessor" because neither the successor nor the predecessor had any ownership interest in the other. *See id.*

In *Amalgamated Meat Cutters*, common control of the predecessor's and the successor's operations was even more complete than in *Howard Johnson*, yet the court there also rejected the imposition of alter ego liability. In *Amalgamated Meat Cutters*, the D.C. Circuit found " 'substantially identical' management, busi-

ness purpose, operation, equipment, customers, and supervision" between the predecessor and successor corporations. 663 F.2d at 226-27. This common control specifically included labor relations. In both the predecessor and the successor corporations, the same person "was responsible for the day to day operation of the store and for its labor relations, including the negotiation of collective bargaining agreements and the hiring, scheduling, disciplining, and firing of employees." *Id.* at 225. Nonetheless, the D.C. Circuit rejected the union's contention that the companies were alter egos because the element of substantially identical ownership was missing. *Id.* at 227.

The Ninth Circuit's finding of alter ego status in the case at bar is in irreconcilable conflict with *Howard Johnson* and *Amalgamated Meat Cutters*. The latter decisions expressly reject the imposition of alter ego liability in the absence of substantially identical ownership. The Ninth Circuit, by contrast, expressly states that "common ownership" "need not be present." App. 170a. Thus, even though the Ninth Circuit acknowledged the complete absence of common ownership, it nonetheless held that the O'Neill Companies were the alter egos of the successor companies. This Court should grant the petition for certiorari to resolve the substantial confusion among the lower federal courts concerning whether substantially identical ownership is necessary to a finding of alter ego liability.

Resolution of this question is of great importance to the business community. If allowed to stand, the Ninth Circuit's imposition of alter ego liability in the absence of common ownership would have a substantial chilling effect on otherwise routine asset transfers. As this Court stressed in *Howard Johnson*, "nothing

in the federal labor laws 'requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor.' " 417 U.S. at 261 (quoting *NLRB v. Burns Int'l Security*, 406 U.S. 272, 280 n.5 (1972)). This view comports with the economic reality that " '[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision.' " *Id.* (quoting *Burns*, 406 U.S. at 287-88). The Ninth Circuit's decision in this case contradicts these "basic principles." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

April 7, 1993

Respectfully submitted,

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APPENDIX

APPENDIX

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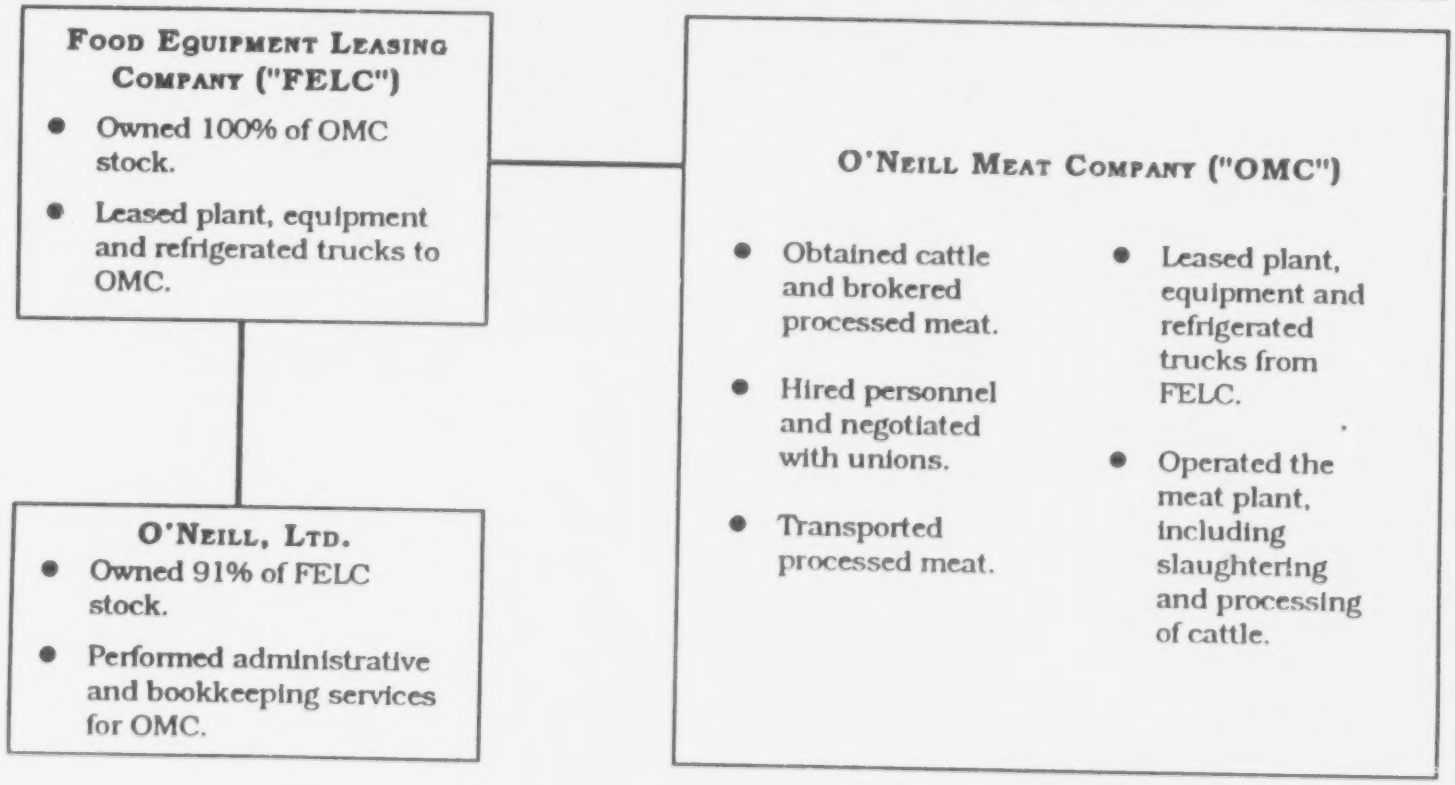
(PRE-NOVEMBER 18, 1977)

O'NEILL COMPANIES



(POST-DECEMBER 12, 1977)

O'Neill Companies

Food Equipment Leasing Company ("FELC")

- Leased plant and equipment to FBP.
- Leased refrigerated trucks to JET.

O'Neill, Ltd.

- Provided accounting and bookkeeping services to FBP, SPM, and DTC.
- Owned 91% of FELC stock.

Non-O'Neill Successor Companies to OMC

Fresno Beef Packers ("FBP")

- Leased plant and plant equipment from FELC.
- Operated plant, including slaughtering and processing of cattle.

Don Turner Corporation ("DTC")

- Acted as labor contractor providing labor and personnel services to FBP.

Sierra Pacific Meat Company ("SPM")

- Obtained cattle on consignment, and brokered processed meat and carcasses to wholesalers and retailers.

J&E Transport, Inc. ("JET")

- Leased refrigerated trucks from FELC.
- Transported meat processed by FBP to SPM customers.

APPENDIX A

Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. *and* United Food & Commercial Workers Union, Local 126, AFL-CIO *and* General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO.[1] Cases 32-CA-848 and 32-CA-928

May 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 30, 1982, Administrative Law Judge William L. Schmidt issued the attached decision. United Food & Commercial Workers Union, Local 126, AFL-CIO filed exceptions, a brief in support of the exceptions, and a brief in support of the judge's decision. Respondents Edwin R. O'Neill, O'Neill, Ltd., Amalgamated Meat Company, and Food Equipment Leasing Company (O'Neill entities) filed exceptions and a supporting brief. Respondent J & E Transport filed exceptions and a supporting brief, in which it incorporated by reference the exceptions and supporting arguments contained in the briefs filed by the other Respondents. Additionally, Respondents Don Turner Corporation, Fresno Beef Processors, and Sierra Pacific Meat Company joined in and adopted the exceptions and briefs

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. The caption has been amended to reflect that change.

in support of exceptions filed by Respondents O'Neill entities and Respondent J & E Transport. Respondents O'Neill entities joined in and adopted the exceptions and supporting brief filed by J & E Transport.

The General Counsel filed cross-exceptions to the judge's decision, a supplemental brief in answer to the Respondents' exceptions and in support of its cross-exceptions to the judge's decision, and an answering brief in support of the judge's decision. Local 126 joined in and adopted the exceptions and supporting briefs filed by the General Counsel. Respondents O'Neill entities filed an answering brief to Local 126's exceptions and the General Counsel's cross-exceptions to the judge's decision. Respondents Don Turner Corporation, Sierra Pacific Meat Company, and J & E Transport joined in and adopted the answering brief filed by Respondents O'Neill entities.

On March 25, 1985, the Board issued a Notice to Show Cause why the Board should not dismiss the complaint in its entirety in light of *Ducane Heating Corp.*, 273 NLRB 1389 (1985). Respondents O'Neill entities filed a brief on April 8, 1985. Respondent Don Turner Corporation joined in the O'Neill entities brief on April 9, 1985. On May 9, 1985, the General Counsel filed a response to the Notice to Show Cause. Local 126 and Local 431, on May 10 and 13, 1985, respectively, filed responses to the Notice to Show Cause.

On August 1, 1985, the Board remanded this case to Judge Schmidt for further consideration of the 10(b) issues. On April 30, 1986, Judge Schmidt issued the attached supplemental decision. Respondents O'Neill entities filed exceptions and a supporting brief to the supplemental decision.[2] Respondent J & E Transport filed a brief excepting

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[2] The request for oral argument made by Respondents Edwin R. O'Neill, O'Neill Ltd., Amalgamated Meat Company, and Food Equipment Leasing Company is denied because the record, the exceptions and the briefs adequately present the issues and the positions of the parties.

to the supplemental decision and joined in and adopted the exceptions and brief filed by Respondents O'Neill entities. Local 126 filed a response to the exceptions "of the employers." Local 431 filed an answering brief to the exceptions and brief of Respondent J & E Transport. The General Counsel filed a brief in response to the exceptions of Respondents O'Neill entities to the supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions,[4] and

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[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

All the Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondents contend that the judge's credibility resolutions, factual findings, and legal conclusions are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact."

[4] The following are corrections to certain of the judge's citations:

NLRB v. Big Bear Supermarkets, 640 F.2d 924 (9th Cir. 1980); *Dee Cee Floor Covering*, 232 NLRB 421 (1977), overruled in *John Deklewa*

to adopt the recommended Order[5] as modified.

1. We adopt the judge's conclusion in his supplemental decision that the statute of limitations in Section 10(b) of the Act commenced on September 21, 1978, and that the General Counsel reinstated the charges in these consolidated cases within the 10(b) period. We find, for the reasons set forth by the judge, that the Respondents fradulently concealed from the Charging Parties the operative facts underlying the alleged violations.

The judge found that the Respondents engaged in an elaborate scheme designed to evade a lawful contractual obligation with employee bargaining representatives and the duty to bargain under the Act. As part of this scheme, the O'Neill entities purported to close the meat plant and then reopen it through apparently nonrelated corporations that were, in fact, "fronts" controlled by the O'Neill entities. The Respondents' entire scheme was marked by efforts at concealing the operative facts regarding the closing and reopening of the meat plant.[6]

& Sons, 282 NLRB 1375 (1987); *NLRB v. Houston Distribution Services*, 573 F.2d 260 (5th Cir. 1978); *Mason City Dressed Beef*, 231 NLRB 735 (1977), modified 590 F.2d 688 (8th Cir. 1978); *Eltra Corp.*, 225 NLRB 1 (1976), revd. sub nom. *Prestolite Wire Division v. NLRB*, 592 F.2d 302 (6th Cir. 1979); *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335 (9th Cir. 1981), vacated and remanded 461 U.S. 731 (1983); *Ogle Protection Service*, 149 NLRB 545 (1964); *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944); *Holmberg v. Ambrecht*, 327 U.S. 392 (1946).

In reaching our decision, we have not relied on *Bill Johnson's Restaurants*, above.

[5] We find no merit in Local 126's request for litigation expenses or other extraordinary remedies. *Heck's Inc.*, 215 NLRB 765 (1974). See also *Wellman Industries*, 248 NLRB 325 (1980).

[6] As the judge noted, a definition of alter ego generally includes the

Further, in finding fraudulent concealment, we also rely, as did the judge, on the misrepresentations made by the Respondents to Local 126 during the effects bargaining.[7] During the bargaining, Local 126's attorney asked the Respondents' attorney if Edwin O'Neill was going out of the meat packing business, with no intention of returning; the answer was "yes." The Respondents' attorney also denied that O'Neill had any interest in Fresno Beef Processors, the new lessor of the meat plant, when in fact O'Neill controlled it. Also, Local 126's attorney asked the Respondents' attorney if the meat plant was going to be leased and was told that they were trying to work out a lease. In fact, a lease had already been signed, on December 1, 1977, between Food Equipment Leasing Co. and Fresno Beef Processors, Inc.

In *Burgess Construction*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979), the Board quoted the Supreme Court to the effect:

> It has long been recognized that when a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . . .' "[8]

In *Burgess*, the Board held that an employer "fraudulently and deceitfully concealed its unlawful employment of non-

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concept of a "disguised continuance." We have adopted the judge's findings and conclusions regarding the alter ego status of the Respondents. However, we need not decide whether every finding of alter ego status would include a finding of disguised continuance or fraudulent concealment. We do find that these Respondents fradulently concealed the operative facts.

[7] The effects bargaining took place on December 8, 1977, and January 19, 1978.

[8] *Holmberg v. Armbrecht*, 327 U.S. 392, 397, quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874).

union carpenters from the Union by assuring the Union on two occasions that it would no longer employ carpenters."[9] The Board found the 10(b) period was tolled until the union became aware of the employer's actions.

Similarly, in *Strawsine Mfg. Co.*, 280 NLRB 553 (1986), the Board found that the 10(b) period was tolled. The employer had closed a plant and surreptitiously tranferred the operations to another plant to avoid union obligations. Although the charge was filed more than 6 months after the alleged unlawful conduct occurred; the Board found the complaint was not time-barred. In so doing, the Board relied on the employer's having misrepresented its plans about closing its facility and having concealed from the union its decision to relocate the work to another plant. The Board ruled that the 10(b) period did not begin until the union gained knowledge of the relocation decision.

Here, as in *Burgess* and *Strawsine,* the Respondents' misreprentations served to mislead Local 126 regarding the closing and reopening of the meat plant.[10]

Finally, we find that Local 126[11] exercised due diligence in attempting to ascertain the operative facts regarding

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[9] *Id.*

[10] The mere fact that a party makes exculpatory representations does not, by itself, constitute fraudulent concealment or serve to toll the 10(b) period. See *Al Bryant, Inc.*, 260 NLRB 128, 133-135 (1982). When misrepresentations are part of a scheme of concealment and an effort to avoid a party's obligations under the Act, however misrepresentations contribute to a finding of fraudulent concealment. This is particularly true when, as here, the facts regarding a party's conduct are peculiarly within the knowledge of that party.

[11] As the judge noted, Local 431 may appropriately be charged with knowledge equivalent to that possessed by Local 126. It is evident, however, as the judge states, that Local 126 took the lead in pursuing legal claims against the Respondents.

the closure and reopening of the meat plant.[12] It requested information from the Respondents, but it did not receive accurate responses. Local 126's counsel hired a private investigator in December 1977, but Local 126 still failed to discover the facts. Local 126 filed its original charge with the Board in April 1978, but its—and apparently the Regional Office—investigator could not discover at that time sufficient evidence of an unfair labor practice to warrant the issuance of a complaint. In these circumstances, it is clear that Local 126 acted diligently and vigorously to obtain facts that would support an unfair labor practice. The Respondents' elaborate efforts at concealment, however, prevented Local 126—until late September 1978 when the new evidence became available—from learning the operative facts regarding the closing and reopening of the meat plant.

2. We adopt the judge's finding that Edwin R. O'Neill, as an individual, is the alter ego of all the other Respondents in this case and that he is individually responsible for the unfair labor practices.[13] Accordingly, we affirm the judge's decision and impose individual liability on Edwin R. O'Neill. We base our affirmation on O'Neill's dominance of the corporate entities, on our finding that the entities are "largely paper arrangements that do not reflect the business realities,"[14] our finding that O'Neill's individual affairs and those of the Respondent corporations

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[12] As the court noted in enforcing the Board's order in *NLRB v. Burgess Construction*, 596 F.2d 378, 383 (9th Cir. 1979): "If the Union actually knew, or by the exercise of due diligence should have known about the alleged unfair labor practice, the statute would not be tolled."

[13] *Weldment Corp.*, 275 NLRB 1432 (1985); *Workroom for Designers, Inc.*, 274 NLRB 840 (1985); *Campo Slacks, Inc.*, 266 NLRB 492 (1983). See also *Market King, Inc.* 282 NLRB 876 fn. 3 (1987); *Las Villas Produce*, 279 NLRB 883 (1986), and *Cera International Corp.*, 272 NLRB 1360 (1974).

[14] *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 403 (1960).

were so intermingled that no distinct corporate boundaries existed.

3. In his recommended Order, the judge ordered the Respondents collectively to offer, inter alia, reinstatement with backpay to all employees terminated as a result of the closure of the meat plant in November 1977 and to mail a copy of the attached notice to all such employees.[15] The Respondents excepted, contending that, based on the allegations contained in the complaint and the issues litigated before the judge, only the employees in the units represented by the Charging Parties are entitled to be covered by the remedy.

In his recommended Order, the judge ordered the Respondents to mail a copy of the notice to the employees terminated in November 1977. Local 126 filed exceptions, contending that the Respondents should also be required to mail the notice to all the employees hired when the Respondent corporations opened for business in 1977, in addition to those employees terminated as a result of the closure of the meat plant in November 1977.

We find merit in both exceptions. We shall order the Respondents to offer reinstatement with appropriate backpay only to the employees in the appropriate units represented by the Charging Parties.[16] Consistent with this

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[15] We take judicial notice that in the companion case *O'Neill, Ltd.*, 288 NLRB 1397 (1988), issued today, Judge Shapiro found, based on the stipulated record, that the meat plant ceased operations on February 18, 1981.

[16] The complaint alleged 8(a)(5), (3), and (1) violations concerning the unit employees represented by Charging Parties Local 126 and Local 431. There were no allegations regarding nonunit employees. Accordingly, the remedy cannot be extended to cover these unnamed employees. *TLI, Inc.*, 271 NLRB 798, 806 (1984); *Consolidated Casinos Corp.*, 266 NLRB 988 (1983); *Iron Workers Local 480 (Building Contractors of N.J.)*, 235 NLRB 1511, 1512 fn. 4 (1978); *Rushton & Mercier Woodworking Co.*, 203 NLRB 123, 126 (1973); and *H. & F. Binch Co.*, 188 NLRB 720, 726 (1971), enfd. as modified 456 F.2d 357 (2d Cir. 1972).

modification, we will order the Respondents to mail copies of the attached notice to all employees employed in the appropriate units represented by the Charging Parties who were terminated when the meat plant closed in November 1977 and all employees employed in the appropriate units represented by the Charging Parties who were hired when the Respondent corporations opened for business in December 1977.[17]

4. In his recommended Order, the judge ordered the Respondents to reimburse Local 126 for the expenses that it incurred in bargaining over the effects of the closure of the meat plant in November 1977. The judge gave this remedy in order to restore the status quo ante. The judge found that the effects bargaining was "conducted in bad faith for the purpose of creating the illusion that O'Neill was terminating his meat processing operations," when, in fact, O'Neill was continuing his operation through the use of "fronts."

The judge found, and we agree, that the effects bargaining was a complete and utter sham from start to finish. The Respondents entered into the bargaining with the knowledge that the O'Neill meat plant was not permanently closed. O'Neill effectively controlled the four new corporations and the lease of Food Equipment Leasing Corporation by Fresno Beef Processors, Inc. had already been executed on December 1, 1977.

On the facts of this case, in a narrow holding, we affirm the judge. In order to perpetuate its unfair labor practices, the Respondents falsely informed Local 126 that it would cease to operate the meat plant. Relying to its detriment on this information, Local 126 entered into and engaged

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[17] We make these modifications because the employees hired in December 1977 were also discriminatees and suffered from the unfair labor practices of the Respondents. Further, the plant legitimately closed on February 18, 1981, so no notice can be posted.

in effects bargaining with the Respondents. In the absence of the Respondents' misrepresentations, there would have been no effects bargaining. The Respondents encouraged Local 126 to waste its resources by participating in effects bargaining when it knew that it would be resuming operation of the meat plant; and, therefore, the collective-bargaining agreement with Local 126 was still in effect and binding. The economic resources wasted by Local 126 in its needless effects bargaining were the "direct and proximate"[18] result of the Respondents' willful defiance of its statutory obligation. The Respondents' scheme had as one of their objectives the obliteration of its collective-bargaining obligation to Local 126.

5. In his recommended Order, the judge ordered the Respondents[5] to make the Charging Parties whole (with interest) for all initiation fees and dues they would have received but for the Respondents failure to apply the terms of the collective-bargaining agreements.

As we noted above, the Respondents were bound by valid collective-bargaining agreements with Local 126 and Local 431.[19] Both agreements contained valid union-security agreements. Also, we note that Local 126's contract contained a dues-checkoff provision and an initiation fee deduction (if due and owing).

We affirm the judge's Order and shall require the Respondents to remit to the Unions the dues and the initiation fees, if any, for each bargaining unit member who executed a dues-deduction authorization and/or an ini-

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[18] *Harowe Servo Controls*, 250 NLRB 958, 965 (1980). See also *J. P. Stevens & Co.*, 239 NLRB 738 (1978), modified 623 F.2d 322 (4th cir. 1980), cert. denied 449 U.S. 1077 (1981). See also *Wellman Industries*, 248 NLRB 325 (1980).

[19] Local 126's agreement ran from January 1, 1977, to December 31, 1979; Local 431's agreement ran from October 1, 1976, to September 30, 1979.

tiation fee deduction authorization, together with interest.[20]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Edwin R. O'Neill, an Individual; O'Neill, Ltd., Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company; and J & E Transport, Fresno, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Offer to all employees, employed in the appropriate units represented by the Charging Parties, who were terminated as a result of the closure of the O'Neill Meat Plant on November 18, 1977, immediate and full reinstatement to their former positions of employment dismissing, if necessary, anyone who may have been hired to perform the work that they had been performing prior to the date on which they were terminated or, if their former positions no longer exist, to substantially equivalent

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[20] The requirement of the dues-deduction authorization is a clarification of the judge's Order, as is the requirement of the initiation fee deduction authorization. Although the judge, in his recommended remedy, did not explicitly limit the dues and initiation fee reimbursement to that which would have been received from unit members who executed the appropriate authorizations, this limitation is a standard part of this remedy. See *Timber Products Co.*, 277 NLRB 769 (1985); *Seneca Sheet Metal*, 243 NLRB 624 (1979), affd. 646 F.2d 1170 (6th Cir. 1981); *Stackpole Components Co.*, 232 NLRB 723 (1977). Local 431's agreement does not contain a provision for either dues-checkoff or initiation-fee deduction. Consequently, it may be that this part of the remedy only extends to Local 126 and not to Local 431.

Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

positions, without prejudice to their seniority or any other rights or privileges, and make them whole for all losses suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of the judge's decision."

2. Substitute the following for paragraph 2(h).

"(h) Mail a copy of the attached notice marked 'Appendix' to the last known address of all employees employed in the appropriate bargaining units represented by the Charging Parties, who were terminated as a consequence of the closing of the O'Neill Meat Plant on November 18, 1977, and all employees employed in the units represented by the Charging Parties who were hired when the Respondent corporations opened for business in 1977."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain, on request, with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, as the exclusive representative of our employees employed in the units described below. United Food & Commercial Workers Union, Local 126, AFL-CIO represents the following employees:

> All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooker, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clerical, guards and supervisors as defined in the Act.

General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO represents the following employees:

> All drivers employed at the O'Neill Meat Plant in Fresno, California; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to apply the terms and conditions specified in the collective bargaining agreements, which O'Neill Meat Company, now known as Amalgamated Meat Company, entered into with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO in February and April 1977, respectively, absent the written consent of the signatory union.

WE WILL NOT operate the O'Neill meat plant using different corporate entities for the purpose of avoiding our obligations under a collective-bargaining agreement or our legal obligation to recognize and bargain with a labor organization that represents our employees, or terminate and refuse to reinstate employees to achieve this purpose.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL apply the terms and conditions contained in the most recent collective-bargaining agreements, which were in effect with the United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters

Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO until a succeeding agreement is reached as a result of collective bargaining or until a bona fide impasse is reached in negotiations for a new agreement.

WE WILL offer immediate and full reinstatement to all employees employed in the appropriate units represented by United Food & Comercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO who were terminated when O'Neill Meat Company, now known as Amalgamated Meat Company, in November 1977, ceased participation in the operation of the O'Neill meat plant, to their former positions of employment—dismissing, if necessary, anyone who may have been hired or assigned to perform the work they had been performing prior to their termination—or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make whole all employees employed in the appropriate units represented by United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO who were terminated when the O'Neill Meat Company, now known as Amalgamated Meat Company, ceased participating in the operation of the O'Neill meat plant, in November 1977, for losses they suffered as the result of our unlawful discrimination against them, together with interest on the backpay, which may be due to such employees.

WE WILL make all employees employed in the appropriate units represented by United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen & Helpers of America, AFL-CIO whole for the losses they suffered as a consequence of our failure to apply the terms and conditions of the collective-bargaining agreements described above after November 23, 1977, together with interest on any backpay that may be due to such employees.

WE WILL reimburse United Food S Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO for the initiation fees and dues those organizations lost, if any, as a consequence of our failure to apply the terms and conditions of the collective-bargaining agreements described above together with interest on any such sums.

WE WILL reimburse any trust funds provided for in the above-described collective-bargaining agreements for the losses they may have suffered as a consequence of our failure to apply the terms and conditions of those collective-bargaining agreements.

WE WILL reimburse United Food & Commercial Workers Union, Local 126, AFL-CIO for the expenses they incurred in bargaining over the closure of the meat plant in November 1977.

failure to apply the terms and conditions of those collective-bargaining agreements.

WE WILL reimburse United Food & Commercial Workers Union, Local 126, AFL-CIO for the expenses they incurred in bargaining over the closure of the meat plant in November 1977.

EDWIN R. O'NEILL, AN INDIVIDUAL; O'NEILL LTD.; FOOD EQUIPMENT LEASING COMPANY; AMALGAMATED MEAT CO., FRESNO BEEF PROCESSORS, INC.; DON TURNER CORPORATION, SIERRA PACIFIC MEAT COMPANY, INC.; AND J & E TRANSPORT, INC.

Charles A. Askin, Esq., for the General Counsel.
George Tichy, II and *Michael J. Hogan, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco and Fresno, California, for Respondents O'Neill, Ltd.
Donald Fischbach, Esq. (Baker, Manock & Jensen), of Fresno, California, for Respondent Fresno Beef Processors, Inc.
William A. Quinlan, Esq. (Doty, Quinlan, Keersha & Fanucchi), of Fresno, California, for Respondent Don Turner Corporation.
R. Frank Butler, Esq., of Fresno, California, for Respondent Sierra Pacific Meat Company, Inc.
Howard A. Sagaser, Esq. (Thomas, Snell, Jamison, Russell, Williamson & Asperger), of Fresno, California, for Respondent J & E Transport, Inc.
David A. Rosenfeld, Esq. (Van Bourg, Allen, Weinberg & Roger), of San Francisco, California, for Charging Party Food & Commercial Workers.
George A. Carter, Esq., of Fresno, California, and *Neil Bodine, Esq. (Beeson, Taylor, Kovach & Silbert)*, of Sacramento, California, for Charging Party Teamsters Local 431.

DECISION

Statement of the Case

William L. Schmidt, Administrative Law Judge. This matter was heard by me for 30 hearing days between January 15, 1980 and April 11, 1980, at Fresno, California. The case is based upon a charge filed in 32-CA-848 by United Food & Commercial Workers Union, Local 126, AFL-CIO (Butchers), a charge filed in 32-CA-928 by General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Teamsters), and an amended consolidated complaint (complaint) dated April 27, 1979, issued on behalf of the General Counsel of the National Labor Relations Board (the Board) by the Regional Director for Region 32

of the Board. The complaint alleges that the Respondents violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, (the Act), regarding the closing and subsequent reopening of a meat processing facility (O'Neill meat plant or meat plant) located in Fresno, California, in late 1977. The timely answers filed by the various Respondents deny the commission of the alleged unfair labor practices and assert certain affirmative defenses discussed below.

At the hearing in this matter, all parties were provided with full opportunity to present relevant evidence, to examine and cross-examine witnesses, to argue orally and to file post-hearing briefs with the undersigned. On the record made in the proceedings in this matter, my observation of the witnesses who testified, and my careful consideration of the briefs filed on behalf of the General Counsel, the Respondents and the Butchers Union, I make the following:

FINDINGS OF FACT

I. THE BOARD'S JURISDICTION

The complaint alleges that each of the corporate Respondents is a California corporation that maintains its principal office and place of business in Fresno, California. The parties stipulated, and I find, that in the year prior to November 18, 1977, O'Neill, Ltd., Food Equipment Leasing Company f/k/a O'Neill Meat Co. (FELC), and Amalgamated Meat Company, f/k/a O'Neill Meat Company (OMC)[1] each sold goods and services valued in excess of $ 50,000 to customers within the State of California that met one of the Board's jurisdictional standards other than indirect inflow or indirect outflow. Based on the evidence

[1] OMC is used as the acronym for Amalgamated Meat Company inasmuch as the corporate entity was known as O'Neill Meat Company at all times when it was operational and was renamed Amalgamated after it ceased business.

discussed below, it is also my finding that O'Neill, Ltd., FELC and OMC constituted, at all material times between January 1 and November 23, 1977, a single employer operating the O'Neill meat plant as a single integrated enterprise; that Respondents Sierra Pacific Meat Company, Inc. (SPM), Don Turner Corporation (DTC), Fresno Beef Processors, Inc. (FBP) and J&E Transport, Inc. (JET) were, at the material times following November 23, 1977, the alter ego of OMC; that, at all material times after November 23, 1977, Respondents O'Neill, Ltd., FELC, SPM, FBP, DTC and JET, collectively, constituted the alter ego of the aforementioned single integrated enterprise operating the O'Neill meat plant, and constituted a single employer within the meaning of Section 2(2) of the Act engaged in commerce, or an industry affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.[2] I further find that it would effectuate the policies of the Act for the Board to exercise its jurisdiction over the instant labor dispute.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and I find, that the Butchers and the Teamsters are each a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *An Overview*

The issues raised by the complaint pertain to the closing of the O'Neill meat plant in Fresno, California, on or about

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[2] Contrary to the contention of Respondent Edwin R. O'Neill I find it is unnecessary for the General Counsel to demonstrate that he is engaged in commerce in his individual capacity. For reasons set forth below, it is my finding that O'Neill is the alter ego of O'Neill Ltd. and its various subsidiaries. That finding, coupled with the acknowledged service of the charge on O'Neill Ltd., is adequate to confer jurisdiction as to O'Neill in his individual capacity. *Certified Building Products, Inc. v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1976).

November 18, 1977, and its subsequent reopening three weeks later on December 12, 1977, as a non-union entity. As a result of the series of complex transactions involved in this transition the General Counsel alleges that the Respondents collectively violated Section 8 (a) (1), (3) and (5) of the Act. The General Counsel specifically alleges that the Respondents violated the Act by laying off all unit employees at the O'Neill meat plant on or about November 18, 1977. The General Counsel's principal contention is that the business entities that operated the O'Neill meat plant when it reopened on December 12, 1977, are the alter ego of the business entities which previously operated the plant. The General Counsel alleges that when the plant reopened the Respondents deliberately refused to reinstate a majority of the employees in the bargaining unit represented by the Butchers and conditioned the reemployment of the employees in the bargaining unit represented by the Teamsters, on their agreement to work without union representation in order to avoid an obligation to bargain as before, and that the Respondents unilaterally reduced the rates of pay, eliminated numerous benefits, repudiated the existing collective-bargaining agreements, and withdrew recognition from the Butchers and Teamsters which had historically represented appropriate units of employees at the O'Neill meat plant.[3]

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[3] The complaint alleges the following appropriate units:

[UNIT No. 1]

All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clerical, guards and supervisors as defined in the Act.

. . . .

[UNIT No. 2]

All Drivers employed at the O'Neill Meat Plant in Fresno, Cal-

The Respondents claim they are innocent of the allegations of the General Counsel's complaint. The O'Neill Respondents assert that the operation of the meat processing facility had become unprofitable and they were forced to close down the meat plant for that reason. The other Respondents assert, in essence, that they are all independent of the O'Neill entities except for certain arms length business transactions typical among business enterprises, and that they merely stepped into a vacuum created by the failure of the previous operator.

B. *Applicable Legal Principles*

As noted, the General Counsel alleges that the business entities which operated the O'Neill meat plant after December 12, 1977, constitute merely the alter ego of the O'Neill related enterprises which operated the plant prior thereto. In *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974), the Supreme Court, succinctly described the alter ego concept, its normal context and the consequences in the following manner at 259, fn. 5:

> It is important to emphasize that this is not a case where the successor is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the older employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity

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ifornia; excluding all other employees, guards and supervisors as defined in the Act.

On the basis of the evidence, which shows that the foregoing units were the historical units represented by the Butchers (Unit 1) and the Teamsters (Unit 2), I find these units to be appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act. Other evidence shows that the plant maintenance employees were historically represented by Stationary Engineers, Local 39. No charge was filed by that labor organization or any other person on behalf of the employees in the maintenance unit. OMC employed approximately 108 employees in these three units.

> of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. See *Southport Petroleum v. NLRB*, supra; *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963); *NLRB v. Ozark Hardwood Co.*, 282 F.2d 1 (8th Cir. 1960); *NLRB v. Lewis*, 246 F.2d 886 (9th Cir. 1957).

Hence, where there is in reality no real change in the employing entity, there is likewise no change in the required legal obligations regarding labor relations matters. More specifically, this means that an entity found to be an alter ego is not at liberty to unilaterally alter the terms and conditions of employment of employees represented for purposes of collective bargaining under Section 9(b) of the Act, or otherwise act in derogation of the duty to bargain with the exclusive representative of such employees.

From the viewpoint of legal analysis, the Ninth Circuit looks to the same criteria in alter ego cases as it does in cases that require a determination whether two or more business entities constitute a single employer. *NLRB v. Big Bear Super Markets*, 640 F.2d 924 (9th Cir. 1980). Those criteria include: 1) the interrelation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership. *NLRB v. Don Burgess Construction Corp.*, 596 F.2d 378 (9th Cir. 1979). The absence of any one of the foregoing factors in a given case, however, does not preclude an alter ego or single employer finding. *NLRB v. Big Bear Super Markets*, supra. In this case, there is substantial argument over the alter ego issue which centers around the undisputed fact that the formal ownership of the business entities which resumed opera-

tions at the O'Neill meat plant in December 1977, was not vested in the same individual who owned the enterprises that previously operated the meat plant. Even the absence of common ownership, however, does not preclude an alter ego finding. *NLRB v. Big Bear Supermarkets*, supra; *Royal T Meat*, 238 NLRB 245 (1976). But c.f. *Frank Hennigan, et al*, 236 NLRB 1517 (1978). Ultimately cases of this nature involve a factual determination that turns on all the circumstances of the case and which is characterized by the absence of an arm's-length relationship found among unintegrated companies. *NLRB v. Don Burgess Construction Corp.*, supra. Although the Board has stated that it looks to additional factors, it is probably more correct to conclude that any differences that are perceived between the standard applied by the Ninth Circuit and the Board is sematical and not substantive. Nevertheless, in *Crawford Door Sales Company*, 226 NLRB 1144 (1976) the Board stated that an alter ego finding rested on whether "the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." As has been observed in precisely this same context, however, "labor law is concerned with substance, not form." *Dee Cee Floor Covering, Inc.* 232 NLRB 421 (1977).

By contrast, where the new employing entity can be characterized as the "successor" of the old, the legal obligations of the successor regarding labor relations matters are quite different. Typically, a true successor has no obligation to assume the predecessor labor agreements (absent the successor's voluntary agreement to do so) and is at liberty to establish the initial terms and conditions of the work force unilaterally. *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972). In addition, a successor employer need not recognize or bargain with the collective-bargaining representative of the predecessor's employees unless a majority of the successor's unit employees are hired the previous employer's workforce and other factors

pertaining to the nature of the employing entity remain relatively constant. *NLRB v. Burns Security Service, Inc.*, supra; *Pacific Hide & Fur Depot, Inc.*, 553 F.2d 609 (9th Cir. 1977). Even a successor employer, however, is not at liberty to discriminate against the predecessor's employees on the basis of their union membership in order to evade an obligation to bargain. *Howard Johnson Co. v. Hotel Employees*; supra. *NLRB v. Houston Distribution Services, Inc.*, 572 F.2d 260 (5th Cir. 1978); *Crawford Container, Inc.*, 234 NLRB 851 (1978); *Mason City Dressed Beef, Inc.*, 231 NLRB 735 (1977).

C. *Credibility Resolutions*

During the hearing on this matter, 45 witnesses testified—some, unfortunately, testified on several occasions. The record is comprised of approximately 6,000 transcript pages of testimony and argument, and a large number of documents, many of which are extremely complex legal and accounting documents. There is a morass of conflicting evidence among the various witnesses and between the testimonial evidence and the documentary evidence. Any effort to treat and dispose of all of such conflicts in this decision would only serve to confuse and obfuscate the principal issues that must be decided.

In making the findings herein I have set forth what I believe to be reliable, relevant evidence. As this case progresses through the channels of the judicial system there will no doubt be numerous citations to other conflicting or inconsistent evidence. Suffice it to say that I have carefully reviewed all the evidence but, for the reasons set out here, I have deemed that significant portions of the evidence are not reliable for purposes for which it was offered.

The factors that have caused me to adopt one version of events over another included: 1) the demeanor of the witness testifying including the degree to which the wit-

ness was capable of testifying in the absence of leading questions, or testified in a convincing, straightforward manner without being argumentative; 2) the ability of the witness to recall events which a reasonable person would expect the witness to recall after the period of time involved; 3) the circumstances surrounding prior inconsistent statements or actions of witnesses relating to critical matters; 4) the failure to present corroborative evidence when the circumstances indicated the availability of such evidence together with the absence of any explanation for such failure; and, 5) the inherent bias of the witness resulting from the witness' close identification with, or extreme hostility toward, one or more of the parties.

The latter factor merits additional explication and disposition because of a very emotional set of circumstances which unfolded at the hearing. In August 1978, Douglas Ladd, the sales manager for SPM, and Edward Jensen, a supervisor for DTC, were arrested and charged with a felony regarding an alleged scheme whereby higher priced cuts of beef were substituted on orders for wholesale customers in exchange for cash kickbacks.[4] Eventually, Jensen plead guilty of a felony and so admitted on the witness stand in this case. In April 1979, Ladd was tried in a criminal proceeding where he was defended by Attorney Carter. Ladd was found not guilty. At the hearing herein the Respondents vigorously attacked Ladd's credibility. Among other things, the Respondent's sought to prove that Ladd was in fact guilty of the dishonesty with which he was charged in the criminal proceeding. I sustained objects directed at that effort. O'Neill asserts in his brief that those rulings were prejudicial. I find the cases cited in support of that argument to be inapposite. In my judgment, the Respondent's efforts to impeach Ladd in this fashion was clearly predicated on an obviously complex

[4] Prior to November 18, 1977, Ladd and Jensen had been long-term employees of the O'Neill owned enterprises.

matter collateral to this proceeding and as the criminal proceeding against Ladd had previously consumed thirty days, I did not deem it useful to consume time in this proceeding to essentially rehash the evidence presented in the criminal proceeding solely to resolve the credibility of a single witness, and I remain of that view. Moreover, both Ladd and Jensen testified convincingly that they harbored extreme animosity toward O'Neill because they hold him responsible for vigorously pursuing the criminal charges against them. For this reason, I have chosen not to rely on their testimony insofar as my consideration of the merits of this case are concerned except for matters that are favorable to the Respondents or are uncontroverted. Accordingly, I deem the Respondent's arguments about the rulings concerning their attempts to impeach Ladd to be moot. That criminal proceeding, however, is important here for another reason. Several of the witnesses who appeared also testified in the Ladd criminal proceeding. In numerous instances those witnesses were confronted with significant inconsistencies between their testimony at that earlier proceeding and their testimony in this proceeding. Where relevant, I have noted those inconsistencies and I have accorded substantial weight to the lack of a convincing explanation for those inconsistencies.

Because of the variety of inconsistencies present in the testimony and documentary evidence, I have placed special emphasis on the inherent plausibility of each witness' testimony in light of the overall assertions made by the parties and the circumstances shown to exist. Thus, on the one hand, the General Counsel and the Charging Parties attempted to establish that OMC closed its operations on November 18, 1977, and subsequently, on December 12, 1977, four new entities (SPM, FBP, DTC and JET) that were financed and controlled by Edwin O'Neill resumed the operation of the O'Neill meat plant. There is no serious dispute about the fact that each of the new entities per-

formed one portion of the function formerly performed by OMC or that FELC and O'Neill, Ltd. performed many of the same services for the new entities that they had previously performed for OMC, especially in the early stages of the operation. There is likewise no serious dispute about the obvious fact that in operating the meat plant, the four new entities were interdependent on one another for their economic existence. Nevertheless, the Respondents collectively maintain that each of the four new entities were owned and controlled by enterprenuers who were independent of Edwin O'Neill or the enterprises that he owned and controlled, such as FELC and O'Neill, Ltd. For these reasons, in initially approaching the issues of this case, I deemed the testimony offered by the principals of the four new entities as obviously of vital importance, not only to the bona fide nature of the enterprise with which that individual was connected, but also the bona fide nature of the entire operation at the meat plant after December 12, 1977. In each instance, there are glaring flaws in their testimony which, when considered together, has caused me to discount the entire scenario propounded by the Respondents. At various points throughout this decision I will further address specific credibility resolutions where necessary.

D. *The Relevant Facts*

1. O'Neill Meat Co. and its Progeny

O'Neill Meat Co. was formed in 1949 by the father of Respondent Edwin R. O'Neill (O'Neill). In the early 1960's, O'Neill Meat Co. required an existing meat processing facility—then known as Sierra Meat Company—located at the site of the present facility in Fresno. In the late 1960's, O'Neill assumed control of O'Neill Meat Co. following his father's death. This corporate entity continued to operate the meat plant until January 1, 1977. Immediately prior to the transition which occurred in January 1977, O'Neill

owned slightly over 91 percent of the stock of O'Neill Meat Co. Its officers were:

O'Neill	President, Director
Erwin Bartel	Executive Vice President, Director
Kristan O'Neill (wife of O'Neill)	Vice President, Director
Lee Schultz	Secretary
Michael Temer	Treasurer
Leo Nelson	Director
Lawrence Boragno	General Manager, Director

The other supervisory employees of O'Neill Meat Co. were Marion Coots, Ronald Cox, Edward Jensen, Arthur Labrie, Douglas Ladd, William LeRoy, James Mitchell, and Edward Watts.

In the four year period prior to 1977, the financial records of O'Neill Meat Co. indicate that it was suffering severe financial setbacks. Thus, for the company's 1974 fiscal year (October 1, 1973 through September 30, 1974) its losses amounted to approximately $126,000. In the 1975 fiscal year it had earnings of approximately $50,000. In the 1976 fiscal year, the Company's financial records show that it lost slightly over $730,000. It appears that these losses were sustainable as a result of the $1.7 million in accumulated earnings the combined O'Neill entities had as of September 30, 1973.

Although O'Neill Meat Co. had a long-established collective-bargaining relationship with the Butchers, the Teamsters and the Stationary Engineers prior to the mid-1970's and had never suffered strike action by those labor organizations, other evidence indicates that O'Neill was adopting a tougher stance on collective bargaining matters. Thus, in 1975, O'Neill Meat Co. retained the services of Alpha Agency, a firm owned by Lee Brewer and engaged in business as a labor consultant. James Mitchell, the plant engineer, testified that O'Neill asked him on one occasion

in 1975 how the maintenance employees felt about the union and whether there were any forseeable problems with getting out of the union. In February 1976, both O'Neill and Brewer threatened the supervisors—many of whom had been union members at the plant for a number of years while employed as unit members—with the loss of their jobs if they did not resign their union membership. Following the closure on November 18, 1977, an agent of the Alpha Agency instructed one of the supervisors on hiring practices designed to avoid a bargaining obligation. This latter evidence is treated in more detail below.

In the Fall of 1976, O'Neill and Brewer negotiated new collective-bargaining agreements with the Teamsters and the Butchers. These agreements reflect that the management agreed to yearly increases in the wage levels over the term of the new three year agreements notwithstanding the heavy losses which were attributed to the meat plant operation. During the negotiations with the Butchers, there was a discussion concerning a proposal to implement a 4-day, 10-hour-per-day work week without overtime to replace the contractually guaranteed 40-hour-workweek over 5 days. Although the evidence shows that the local Butchers negotiators had received approval from their parent body to enter into an agreement that included such a provision, the local negotiators ultimately refused to agree to such a provision. A year later, a similar proposal would become quite critical.

At approximately the same time that the negotiations for the new collective bargaining agreements were concluded, O'Neill undertook to reorganize the corporate structure which operated the meat plant. O'Neill asserted that this action grew out of discussions he had had with financial and bank advisors over the previous two year period and that the purpose of the reorganization at this time was to cut the losses that were being incurred from the operation of the meat plant in the face of increased competition from midwestern competitors with more fa-

vorable labor agreements. As envisioned by his financial advisors, O'Neill would benefit by the creation of a leasing enterprise because of the favorable tax treatment such entities receive. However, the creation of a new corporate entity to serve as the leasing enterprise was deemed inappropriate because of the detailed documentation that would be necessary to avoid the potential for the occurrence of a taxable event resulting from an inter-corporate transfer of the plant facility and equipment. Instead, the decision was made to transform O'Neill Meat Co. into a leasing enterprise as it already held title to the plant facility and substantially all the equipment used in the meat processing business. As a consequence, the corporate entity named O'Neill Meat Co. was renamed Food Equipment Leasing Company (FELC) in early 1977.[5] In addition the directors of O'Neill Meat Co. authorized a corporate entity established by O'Neill in late 1976 to use the name O'Neill Meat Company (OMC). O'Neill, Ltd., a corporate entity that had been inactive from its inception in 1973, was also activated at approximately the same time. As of January 1, 1977, all the employees of O'Neill Meat Co. were transferred to the payroll of OMC or O'Neill, Ltd.[6] OMC operated the meat plant, which it leased from FELC with the equipment that it also leased from FELC. OMC's administrative and bookkeeping services were performed for a fee by O'Neill, Ltd, which as the 1977 calendar year progressed, became a holding company for several other O'Neill owned enterprises. At the time of the transformation of O'Neill Meat Co. a/k/a FELC into a leasing corporation, O'Neill, Ltd. held over 91% of the stock of

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[5] Bartel and O'Neill testified that the corporate name change occurred in late 1976. The articles of incorporation, however, were not amended to reflect this name change until late March 1977.

[6] The employees who apparently commenced working for O'Neill, Ltd. about this time were primarily clerical, data processing and administrative employees.

FELC and FELC, in turn, owned all of the stock of OMC; O'Neill held 94% of O'Neill, Ltd.

As noted above, a substantial portion of the employees of O'Neill Meat Co. were transferred to the payroll of OMC effective January 1, 1977 when it became the lessor-operator of the meat plant. The officers of OMC were:

O'Neill	Chairman of the Board, Director
Lawrence Boragno	President, General Manager, Director
Douglas Ladd	Vice President, Sales Manager
Erwin Bartel	Director

Apart from the foregoing the supervisory personnel of OMC were Marion Coots, Ronald Cox, Edward Jensen, Jay Kanawyer, Arthur Labrie, William LeRoy, James Mitchell and Edward Watts. Boragno testified that as a practical matter around the plant the managerial hierarchy went from himself, to Bartel, to O'Neill.[7] At the hearing, the only other individual who demonstrated knowledge of the corporate reorganization which occurred in late 1976 and early 1977, other than O'Neill, was Bartel. By contrast, Boragno testified that it was not until the hearing that he realized there was a difference between O'Neill Meat Company and O'Neill Meat Co. Boragno further testified that the first that he learned that he was president of OMC was when O'Neill introduced him as such to two Butchers representatives in late February 1977 and requested that he sign the collective bargaining agreements

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[7] Boragno impressed me as a reliable, convincing witness. Overall the evidence here demonstrates that he was a trusted employee who came up through the ranks in his 29 years with the O'Neill enterprises. Notwithstanding the titles of his various positions, his role was almost entirely related to the operational aspects of production. The evidence shows that regarding business and financial policy, O'Neill and Bartel were the sole individuals who exercised responsible authority. In this latter regard, Boragno merely signed and did what he was told to do.

which O'Neill and Brewer had negotiated with that labor organization earlier.[8] Although the Butchers had become aware the transition had taken place by October 1977, there is no credible evidence that there was a disclosure of the nature of the reorganization to any labor organization at the time that it occurred.[9] Regardless of the corporate structure, the meat plant was clearly a necessary and vital segment of the total O'Neill operations at the start of 1977. Thus, in addition to the entities involved in the operation of the meat plant in 1977—O'Neill, Ltd., FELC and OMC—O'Neill was also the sole owner of O'Neill Cattle Feeding Co., Inc. and O'Neill Livestock Company. The former appears to have been an extensive cattle feeding operation and the latter was a farming and livestock raising operation. In addition, several O'Neill entities and O'Neill personally had an interest in a third operation known as the OLM Cattle Venture. At the hearing, O'Neill testified that the trade name "O'Neill Fed Beef" had a degree of acceptance in the industry so as to have an economic value in and of itself. The evidence here warrants the conclusion that the combined O'Neill operations, including the meat plant, constituted an integrated economic unit.

When OMC is isolated out of the integrated economic unit of which it was a part, its financial records demonstrate that the overall corporate restructuring only served to exacerbate the bad financial picture of the meat plant operation. Thus, as reported in the consolidated financial statement of O'Neill, Ltd. for the 1977 fiscal year, the

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[8] Boragno signed the Butchers agreement on behalf of OMC in February 1977 and the Teamsters agreement in April 1977. Both agreements had retroactive effect back to their predecessor agreements.

[9] Regarding this point, an invitation to the December 1976 grand opening of O'Neill, Ltd. was offered in evidence and O'Neill testified that an invitation was sent to the union representatives. There is no evidence that any of the unions pursued even these indications of a transition.

loss attributed to OMC was $654,152. Any comparison, however, between this loss and the losses of earlier years that were incurred by O'Neill Meat Co. would be akin to a comparison of apples and oranges as OMC was an entirely different entity than O'Neill Meat Co. For example, the aforementioned statement reflects expenditures by OMC of $448,772 for lease payments to FELC and $343,742 for administrative expenses to O'Neill, Ltd. In addition, O'Neill Meat Co.'s financial statement for the year ending September 30, 1976, reflects in footnote 2 an income item of $345,508 for accounting, data processing, and management fees which, for that year, was treated for accounting purposes as a reduction in general operating expenses, but that had been treated in previous years as other income. There is no indication that OMC had the capacity for such income as this aspect of O'Neill Meat Co. appears to have been spun off to O'Neill, Ltd. Although there does appear to have been a reduction in the accumulated earnings of the total O'Neill enterprises in the period following 1973, the evidence presented is not sufficient to produce any reliable conclusions as to the precise cause for the reduced earnings. O'Neill emphasized in his testimony and in his dealings with the unions that the losses shown by the corporate entities which directly operated the meat plant resulted from its reduced competitive position vis-a-vis midwestern producers with more favorable labor costs.[10]

Notwithstanding OMC's role in processing and marketing the cattle raised or fed by other O'Neill enterprises, the decision to close OMC was announced to its employees on October 26, 1977. Boragno, OMC's nominal president

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[10] In a couple of letters prepared by O'Neill in this period, however, he alluded to drought conditions as a further contributing factor to the losses. The testimony of Gene Dietz, a Fresno accountant who performed services for the O'Neill entities, suggests that the drought conditions prior to 1978 were a substantial contributing factor to the poor performance of the O'Neill enterprises in this period.

testified that the first he learned of the plan to close OMC occurred on October 26 when he was given the layoff notices to employees to sign. Insofar as this record is concerned, the decision to close OMC appears to have involved only O'Neill and Bartel. Read together their testimony shows that early in 1977 Bartel was making projections of heavy losses for OMC and urged O'Neill to implement certain economies and to renew his effort to obtain an agreement from the Butchers to institute the 4 day work week. It was not until late July or early August 1977, however, that O'Neill undertook discussions with James Whiting of the Butchers in this respect. The evidence shows that in August 1977, Whiting was able to obtain the consent of the unit employees to modify the agreement to implement the 4-day workweek but refused to do so when he was unable to obtain the approval of officials of the International Union to so modify an existing agreement. Later, in October 1977, O'Neill sought unsuccessfully to have the Teamsters forego the contractual wage increase which was to go into effect that month.

The corporate minutes of OMC reflect that a special meeting of OMC's board of directors was held on October 25, 1977, at which Bartel reported a $ 500,000 deficit and that its working capital had "declined another" $160,000.[11] The document further states that Bartel reported that in the near future OMC would not be able to meet its payroll obligations and for this reason he recommended that it be closed immediately. O'Neill concurred: The document then recites:

> On a motion made, seconded and unanimously passed, the following resolution was adopted:
>
> RESOLVED, that due to economic conditions O'Neill Meat Company will discontinue its slaughter and

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[11] The minutes recite Boragno was present. Boragno credibly denied this and asserted the only directors' meeting he attended was when he was made vice president of O'Neill Meat Co.

related activities on November 18, 1977 and that all notices required to be given concerning said closures shall be given at least two weeks prior to said closure date.

FURTHER RESOLVED, that due to said closure the Secretary/Treasurer of the corporation shall proceed to orderly effect said closure with regards to trade accounts payable and collection of accounts receivable.

The following day, October 26, a form notification of layoff was prepared, taken to Boragno for signature and then distributed to each employee of OMC. The form of the layoff notice was as follows:

NOTIFICATION OF LAYOFF

NAME OF EMPLOYEE_____
LAYOFF DATE-*End of shift on November 18, 1977*
REASON-*Economics: Differential between wages paid in Midwest and here*
SUPERVISOR SIGNATURE _____
REMARKS *Indefinite* _____

The first indication of any notification of the closing to any of the labor organizations representing any of the employees was the following letter over Boragno's signature to Whiting that was dated October 31, 1977. The body of that letter reads as follows:

Dear Mr. Whiting:

Thank you for your concern over the plight of O'Neill Meat Company. As you are aware, substantial differential exists between the Midwest meat labor contracts and here, amounting to approximately $900,000 per year at O'Neill Meat Company. Unfortunately, it looks like this will turn out to be a case

> of killing the goose that laid the golden egg in favor of the Midwestern turkey that pays substandard wages.
>
> I sincerely hope that we can work something out with you that will be of assistance in keeping this plant open and its employees still gainfully employed.
>
> Lacking any indication from either the Teamsters or the Butchers on relief from this dilemma leaves no alternative but to lay off our entire work force effective November 18, 1977 at the end of their shifts.

Boragno denied writing this letter; O'Neill candidly acknowledged authoring the "goose that laid the golden egg" phrase. In addition, there is also evidence that O'Neill placed the blame for the closure of OMC squarely on the labor organizations in meetings which he had with individual employees after the announcement. Moreover, in a letter to Whiting following the public announcement of the closure, O'Neill appended an extended analysis of the differential in the wage rates between OMC and Iowa Beef Packers, the midwestern entity whose labor agreements O'Neill found most galling.

Subsequently, on November 8, 1977, O'Neill met with Butchers representative James Whiting and obtained Whiting's agreement to take O'Neill's proposal for an 8 percent wage reduction and the implementation of the 4-day workweek to the Butchers membership. When Whiting represented this proposal to the membership, it was approved. Thereafter, as he had done in August, Whiting sought the approval of the modification from the International Union's vice president, Max Ossolo.[12] Ossolo rejected the proposal

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[12] Based on all of the circumstances, I find, contrary to the Respondent's contention, that O'Neill knew that any final agreement of this magnitutde would not be made by Whiting if his International Union opposed such a modification. Hence, Whiting's testimony to this effect is credited.

on or about November 12, 1977. As a consequence, slaughtering ceased on November 18, 1977. A skeleton crew remained for the purpose of completing the processing of the slaughtered cattle and the closing of the plant. This crew was laid off on November 23. Boragno executed a letter dated November 23, 1977, releasing OMC's Department of Agriculture plant number to FBP. A letter dated November 29 from L. J. Maxey, Jr. to the Department of Agriculture requests the issuance of the number to FBP. Both letters bear the typing logo of Shirley Gregory, O'Neill's secretary.

Notwithstanding the appearance that OMC was permanently ceasing its operations, there is other evidence that the closing was not intended to be permanent. Thus, OMC's plant superintendent, Ronald Cox, testified that he was told by Boragno about a week or 10 days before the actual closing, to tell his supervisors that they would be "taken care of" and that he told the foreman working under him not to go out and look for a job because that would not be necessary. In addition, Butchers Business Representative Lynn White testified that he spoke with Cox about two weeks prior to the closure and that Cox complained to him about the militancy of Shop Steward Barry Wooten. According to White, Cox told him at this time that Wooten would not be rehired when the plant reopened. Salesman Albert Wristen testified that the salesmen were instructed to tell the customers that they would not be closed for long. Employee Rudolph Golston testified that about a week before the closure of OMC Cox told him that he did not think the plant would be closed very long. Finally, the evidence shows that in late 1977, the Wells Fargo Bank extended a line of credit of approximately $2 million to O'Neill-owned cattle feeding entities for the purpose of purchasing cattle for fattening prior to slaughter. As will be discussed in further detail below, when the plant resumed operation in December 1977,

nearly 6,000 cattle purchased with these funds sustained the new operation.

2. Bargaining Related to OMC's Cessation of Operations

Following the plant closure on November 18, bargaining sessions were held between representatives of the OMC and the Butchers concerning the closure of the plant. The first of these meetings was held in Attorney Tichy's office in San Francisco on December 8, 1977. Present on behalf of OMC were Tichy, O'Neill, Brewer and another attorney from Tichy's firm, Rick Harding. Present for the Butchers were representatives Whiting, and White, and the Butchers' attorney, Mike Roger. White took extensive notes of the meeting until until Tichy requested that he cease doing so. White's notes are in evidence and show that Tichy initiated the discussion by pointing out that OMC had attempted to work out its problems with the Butchers but had not been successful in doing so. Tichy further asserted that because of the wage rate differences at OMC and those that a sister local of the Butchers negotiated in, the Midwest, as well as the drought conditions in the State, OMC was operating at a loss. Under these circumstances Tichy said that the plant closure should be considered as permanent but that OMC was not frozen to that idea. Attorney Roger asked pointedly whether or not O'Neill was going out of the meat packing business with no intention of returning to it, and Tichy responded affirmatively. Roger next inquired if the plant was for sale, and O'Neill responded by saying that it was listed in the Wall Street Journal. When Roger next asked whether or not there was a possibility of leasing the facility, O'Neill responded that there was such a possibility. Roger pursued that inquiry, and Tichy responded that they were trying to work out a lease at that time with an entity called

"Fresno Beef Packers."[13] Roger inquired if Tichy represented that group, and Tichy denied that he did.[14] Tichy also denied that O'Neill had an interest in "Fresno Beef Packers." Thereafter, there was a discussion about the type of terms that would be required in order to keep the plant closure from being permanent. Tichy stated that the company needed relief on wages of 15 percent and to reduce the 40-hour guarantee to a 32-hour guarantee or four 8-hour days. Next Roger indicated that the more immediate problem dealt with the earned vacation time of the employees and requested that they be paid upon request. Tichy indicated that he didn't know if money could be allocated for that purpose at this time. When Roger insisted that the vacations be taken care of, O'Neill responded by asking if Roger was aware that OMC had a minus $500,000 net worth and called attention to the fact that the Butchers had seen OMC's financial statement.[15] Following a caucus Tichy returned again to reiterate the proposal of a 15 percent wage reduction a 4-day workweek with a 32-hour guarantee. Whiting indicated that the Butchers would consider this proposal and that, as he had a meeting in Los Angeles the following day, he would call in the evening if something could be arranged.

According to Whiting he met with Butchers' vice president Ossolo and other area Butchers' representatives in Los Angeles on the Friday following the December 8 meeting but he was unable to persuade those at this meeting

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[13] The lease between FELC and FBP shows that it was executed on December 1, 1977.

[14] In fact, both Tichy and Brewer had previously represented another corporation owned by the owner of FBP.

[15] Although there is evidence that the Butchers and Teamsters had reviewed certain financial statements, other evidence indicates that the statements disclosed were limited to OMC and, perhaps, FELC. The evidence whether the FELC statements were disclosed, however, is far from clear.

to authorize a modification of the collective bargaining agreement in the manner sought by O'Neill. That same evening Whiting telephoned O'Neill in Fresno and informed him of the result.

Following an exchange of letters between counsel a second meeting was held in Tichy's office on January 19, 1978, regarding the decision to close and the effects on unit employees of the closing. Present for OMC were O'Neill, Brewer and Tichy. Attorneys Mike Roger and Bill Sokol, and representatives Whiting and White represented the Butchers. At this time the Butchers asked for an explanation of what was going on inasmuch as the facility appeared to be operating. Tichy informed the union representatives that FBP had leased the facility from FELC. Roger attempted to inquire about the connection between FELC and OMC, but beyond learning that they were all corporations, Roger's pursuit of the interrelationship was cut short when Tichy informed him that he was not going to play "20 questions." The parties next discussed the application of the collective bargaining agreement to the operations being conducted by FBP. Tichy took the position that the transfer clauses in the collective bargaining agreement were inapplicable in this case because OMC had not sold, transferred, leased or maintained an operation following its closing. Tichy also informed the representatives of the Butchers that OMC was in the process of winding up its business affairs and was considering filing bankruptcy because of its financial position. Regarding the accrued vacation and sick leave payments being sought by the union representatives Tichy offered at this time to settle on the basis of a 25- to 40-percent payment for those accrued benefits. The parties were unable to reach an agreement to adjust the vacation and sick leave payments on the basis at this time or subsequently.[16]

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[16] On January 19, 1978, the Butchers filed a grievance over the closing of the facility. There was an exchange of letters among attorneys on

Because of these findings, I find that these negotiations were conducted in bad faith for the purpose of creating the illusion that O'Neill was terminating his meat processing operations.

3. The Nature of the Resumed Operation

As noted in the above discussion of applicable legal principles, an alter ego finding is normally characterized by the absence of arm's-length transactions among the accused individuals or enterprises. Therefore, I have carefully examined the detailed evidence offered here for the purpose of ascertaining what conclusion is warranted by a prepondenence of the evidence with respect to the arm's-length nature of the transactions among the Respondent's in this case. A discussion of the more pertinent aspects of that evidence follows.

It is undisputed that the meat plant resumed operating on December 12, 1977. At this time, however, the plant was ostensibly operated by four new corporations, namely, SPM, FBP, DTC and JET. As explained in greater detail below, two O'Neill owned entities—O'Neill, Ltd. and FELC—were direct participants in the resumed operation and other O'Neill entities such as O'Neill Cattle Feeding, contributed to the resumed operation. The hearing in this

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February 8 and March 27 during which there was further explication of the willingness of OMC to make reduced vacation and sick leave payments. In a March 27, 1978 letter from Tichy to another Butchers attorney, Victor Van Bourg, Tichy increased the offer concerning payment of accrued vacation pay and sick leave to 60 percent but provided that it was to be "treated as severance pay." Other evidence indicates that the OMC officers and supervisors were paid similar accrued benefits. In both instances, Tichy emphasized that OMC would be forced to file for bankruptcy if pressed concerning the grievance of January 19, 1978. In fact, certain preparations for the filing of bankruptcy by OMC were undertaken, such as the naming of new officers and directors and changing its name OMC to Amalgamated Meat Co. so the O'Neill name would not be associated with the proceeding.

matter devoted considerable time to the bona fide nature of these four entities.

a. *Ownership and Formation*

The evidence shows that O'Neill had no ownership interest in the four corporate entities that resumed the operation of the meat plant on December 12, and was not an officer, director, or employee of any of these corporations. On the contrary, the initial president and sole owner of SPM was Eric Garrett. L. J. Maxey, Jr. and his son, James Maxey, each owned 50 percent of the outstanding stock of FBP, and they were its sole officers. Donald Turner and his wife were the sole stockholders and officers of DTC. John Abatti and his wife were the sole stockholders and officers of JET. All four of these entities were incorporated in late November and early December 1977. In three instances—SPM, FBP and JET—the attorney who handled the legal matters pertaining to the incorporation matters was David St. Louis, a Fresno attorney, who had previously represented O'Neill on some collection matters and who occasionally met socially with O'Neill.[17] Garrett testified that he contacted St. Louis upon

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[17] St. Louis initially appeared herein as the counsel of record for SPM. He subsequently withdrew early in the proceeding after my following ruling on motions to quash certain subpoenas directed to him:

> As to subpoena ad testificandum A-539107 and paragraphs 3, 4 and 7 of subpoena duces tecum B-185929, compliance therewith as to matters privileged by the attorney-client relationship is stayed pending presentation by the General Counsel or the Charging Parties of sufficient evidence to show that there is reasonable cause under applicable federal law to believe that the allegations in the complaint herein are true and that they occurred in a fraudulent manner. *Clark v. United States*, 289 U.S. 1 (1933); *United States v. Calvert*, 523 F.2d 895 (8th Cir. 1975); *United States v. Bob*, 106 F.2d 37 (2d Cir. 1939); Rule 501, Federal Rules of Evidence; Section 102.31(b), NLRB Rules and Regulations. See also *Schaeffer v. Below*, 278 F.2d 619

the recommendation of attorney James Bell who represented the O'Neill corporations on a variety of complex legal matters including the incorporation of OMC and FELC. L. J. Maxey testified that he went to St. Louis to handle the incorporation of FBP because he wanted to keep the matters pertaining to that corporation separate from his other business enterprises which retained the law firm which represented FBP in these proceedings and that officed in the same building as St. Louis. DTC was capitalized for $ 5,000, the remainder of the corporations were capitalized for $ 2,000 (JET) and $ 1,000 (SPM & FBP). Even these amounts were not paid in the instance of FBP and DTC until May and November 1978, respectively. There is no evidence that any of these corporations obtained a line of credit with any financial institution prior to the commencement of operations on December 12.

The owners of SPM, FBP, DTC and JET were not strangers to O'Neill and the meat plant. Thus, for a number of years prior to the formation of SPM, Garrett had worked as an independent meat broker in the Sacramento, California, area on behalf of O'Neill Meat Co. and its successor. Garrett worked out of his home and called upon customers personally. The closing of the meat plant was, therefore a threat to his livelihood.[18] In addition to FBP, the Maxeys had for a number of years operated a business

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(3d Cir. 1960).

When St. Louis subsequently appeared as a witness, I generally sustained objections to his testimony grounded upon the attorney-client privilege. To the extent that those rulings may have been inconsistent with the conclusions ultimately reached herein, I am satisfied that no prejudicial error occurred.

[18] In explaining the predicament posed for him by the closing of the meat plant, Garrett gave testimony which was curiously contradictory at the heart of O'Neill thesis about the effect of midwestern competition. Thus, Garrett said that he could not broker meat from midwestern suppliers because midwestern beef was unacceptable to his customers.

in the Fresno area known as King-O-Meats. King-O-Meats wholesaled meat products to hospitals and other similar institutions, and the O'Neill plant had for a number of years been a principal source of its meat products. Don Turner was the owner of two firms in the Fresno area which provided security services to business enterprises, including the O'Neill meat plant. Prior to his ownership of JET, John Abatti was the sole proprietor of a trucking company known as John Abatti Trucking. Approximately 75 percent of the business of John Abatti Trucking had been involved with transporting live cattle to the O'Neill meat plant.

On the surface, the meat plant operated after December 12 as a custom kill facility. In the industry that means that the plant operator slaughters cattle as a service for others on a fixed-fee basis. Ostensibly, FBP leased the plant and equipment from FELC for the purpose of engaging in the custom kill operation. DTC was engaged in business as a labor contractor and was retained by FBP for the purpose of furnishing labor to conduct the custom kill operation. JET engaged in business for the purpose of transporting goods as a common carrier via refrigerated trucks which it leased from FELC. SPM's business purpose was that of a meat broker. Notwithstanding the supposed bona fide nature of the relationship of O'Neill Ltd. with the four new entities, the doors to the offices of O'Neill Ltd. were kept closed and locked. As a consequence a morass of documents that went back and forth daily were passed under the locked doors.

A composite of the testimony by the principals of these four corporations (Garrett, the elder Maxey, Turner and Abatti) and O'Neill provided the explanation for the rapid re-establishment of the meat plant operation upon which the Respondent's rely. Thus, the elder Maxey testified that in early October, O'Neill confirmed to him that there was a possibility of closing the plant and Maxey was able to see in this potential event the opportunity to go into a

custom kill operation, which he had thought of doing for some time. Initially, O'Neill offered to sell the plant to Maxey, but he could not afford the purchase price so they discussed the possibility of leasing the plant. In effect, O'Neill turned Maxey over to Bartel to work out the details concerning the lease. After some negotiations (which Maxey described in exceedingly vague terms) lease terms were agreed upon and a lease was drafted for Maxey's consideration. This lease tracked the form of FELC's lease to OMC. Thereafter, Maxey and Bartel bickered over the lease price, and agreement was finally reached. The lease price was the same as FELC's lease price to OMC, namely, $479,321 per annum. In the meantime, Maxey had determined that he was not interested in devoting the time necessary to oversee the work force, which would be necessary for such an operation so he began exploring the possibility of utilizing a labor contractor. Initially, Maxey contacted Brewer of Alpha Agency who had previously represented King-O-Meats.[19] Brewer declined Maxey's invitation to become his labor contractor, citing the fact that such an operation would put him in competition with certain Alpha Agency clients but Brewer recommended Don Turner for this purpose. Although Turner had no experience as a labor contractor in any industry, he undertook to discuss the details of Maxey's proposal. Among other arguments Maxey used to convince Turner of the potential in such an undertaking was the fact that several meat processing plants had closed in the area and, as a consequence, there was an abundance of individuals available with the necessary supervisory skills in the industry who could overcome Turner's lack of direct experience in a slaughtering operation. Eventually, Maxey and Turner arrived at an agreement whereby Turner would act as FBP's labor contractor on a cost-plus-ten-percent basis. As it turned out, however, all of Turner's supervisory personnel

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[19] Prior to the hearing, Brewer was killed in an automobile accident.

were former OMC supervisors but, as will be more fully discussed below, only 40 percent of the production employees (31 of 78) initially employed by Turner came from the ranks of the laid off O'Neill production employees.

John Abatti testified that he first learned of OMC's closing at or about the time that the layoff notices were issued to the OMC employees. Because approximately 75 percent of his livestock training business involved hauling live cattle from feeders to the meat plant, Abatti said he was concerned about this news. That same day he went to see O'Neill, who confirmed that the plant was going to close and that he was probably going to sell or lease the plant. Abatti then asked if he could lease the refrigerated trucks which OMC had theretofore been leasing from FELC. O'Neill told him that he would let him know. On the day the plant actually ceased slaughtering (November 18, 1977) Abatti had another conversation with O'Neill in which O'Neill told him if he could lease the plant, Abatti could lease the trucks. If Abatti's version of these events is true, it would appear that he anticipated that eventuality because he had previously contacted Attorney St. Louis (who had been suggested to him by Bartel) in order to commence the formation of JET.[20] Approximately a week following their November 18 conversation, O'Neill told Abatti that he could lease the trucks and that Bartel had the leases in order. O'Neill also told him that Boragno would probably be working for SPM and he should contact Boragno to arrange to haul the SPM swinging meat. Abatti then proceeded to obtain the leases from Bartel, take them

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[20] Abatti identified a $ 500 check drawn on John Abatti Trucking's account on November 8, 1977, as the original retainer to St. Louis to form JET. JET's articles of incorporation were executed by St. Louis on November 21, 1977. The minutes of the first meeting of JET's board of directors are dated December 5, 1977. In addition, about November 9, 1977, Abatti undertook to file an application with the Public Utilities Commission of the State of California on behalf of the yet-to-be-formed JET to obtain a common carrier permit.

home over night, sign them, and return them the following day. The yearly lease price for the equipment leased or subleased by JET from FELC was $112,015.99, payable in monthly installments beginning in January 1978. No security was required. In addition, JET leased office space from FELC for $ 1800 per year. Those payments were to be made in monthly installments beginning in January 1978. On December 12, 1977, Abatti executed a "use" agreement whereby certain services were to be provided to JET by O'Neill Truck Service which operated a filling station on the premises.[21] Approximately two days after signing the equipment lease, Abatti said he met Boragno outside the plant and asked if he could haul for Sierra Pacific. Borago sealed JET's economic future by saying yes. In Abatti's view, the arrangement turned out very profitable, but there is no evidence about what that means apart from the $ 5000 per month in wages that Abatti and his wife drew from JET because JET never maintained either a monthly or yearly profit and loss record. Unlike the other three entities, JET had no service agreement with O'Neill, Ltd. to perform accounting and administrative services. Abatti's wife, Carol, kept JET's records. Those records will be discussed in more detail below.

Garrett testified that with the closing of OMC, his source of meat to broker was threatened. For this reason, he conceived the idea of forming a meat brokerage company although he did not explain how this would serve to eliminate his immediate problem of having no meat to broker, apart from saying that O'Neill assurred him there would be a supply of meat. As Garrett perceived the future, it would be a simple matter of forming a brokerage corporation, hiring some good people, finding a supply of meat

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[21] The equipment lease is dated December 5, 1977; the office lease December 8, 1977; and the service station use agreement is dated December 12, 1977.

and going from there. Garrett went on to testify that about a month after the plant closed, he made a couple of trips to Fresno to discuss his idea of a brokerage company. Garrett said that on the first occasion he met with O'Neill, Bartel and Boragno. Among other things, Garrett said that O'Neill assured him there would be a source of supply. On the second visit to Fresno, Garrett met O'Neill, Bartel and Boragno at the plant and the three men proceeded to the Hilton Hotel for lunch where they met with Attorney Bell who represented some of the O'Neill entities. They discussed forming a corporation and according to Garrett, Bell recommended that he obtain a "corporate" lawyer and suggested Attorney St. Louis. Garrett, however, returned to his home in Sacramento without following up on Bell's suggestion. A few days later, Garrett allegedly telephoned St. Louis and arranged to have SPM formed as a California corporation. Garrett supplied the corporate name and the names of Boragno and Ladd as officers. The articles of incorporation were executed on December 7, 1977, by St. Louis' secretary. Although the minutes of the first meeting of the Board of directors of SPM is in evidence and recites that the meeting was held in St. Louis' office on December 21, 1977, in fact, Garrett said he never attended such a meeting. Instead, Garrett apparently signed the minutes when St. Louis came to his home in early January 1978. In addition, St. Louis testified that his appointment calendar reflected that he had an appointment with Boragno, Ladd and Bartel at 4:45 p.m. on January 10, 1977. St. Louis testified that Ladd and Boragno executed some corporate documents at that, time but that Bartel was not present when this business was transacted. By and large, Garrett said that he delegated numerous duties to Boragno. According to Garrett, however, both he and Boragno inspected the offices utilized for a period of time by SPM on P Street in Fresno.

On the basis of the foregoing evidence certain preliminary conclusions are warranted. First, the new entities

were owned by individuals who had been economically associated with the prior operation of the meat plant. Second, with the possible exception of Turner, the owners of the new entities were shown to have a substantial dependence on the operation of the meat plant.[22] Third, if the testimony of the principals of the new entities is accepted as true, three of the new enterprises, SPM, FBP and JET, undertook to establish their business without any significant coordination with, or consideration for, the others. Fourth, the plant and equipment used by the new entities were owned entirely by O'Neill controlled enterprises. Fifth, with only minimal capitalization, no know lines of credit and no assurance of significant revenues, FBP and JET undertook significant lease obligations to the O'Neill enterprises.[23]

On August 3, 1978, Garrett sold his interest in SPM to Steven Diebert. It appears that Garrett did so because he did not relish the prospect of being in a position of prosecuting the individuals who were being implicated in the allged kick back scheme.

Diebert was a CPA who had an office in the same building as St. Louis. He was induced to buy SPM by St. Louis' representations. St. Louis told Diebert that SPM was losing money at that time but it had a high sales volume and there was a possibility it could become profitable with new management, and that Diebert would incur no personal liability.[24] Diebert agreed to purchase the company, essentially sight unseen, for the asking price of $1000—

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[22] Regarding Turner, there is no evidence what portion of the income of his other two enterprises was derived from the security work performed at the meat plant.

[23] There was no showing that ability of the principals of the new entities to amass working capital even remotely approached that of O'Neill.

[24] In fact, the evidence shows that SPM's sales volume in its first year was just short of $ 1,000,000 per week.

the same amount as SPM's original capitalization.[25] He had no negotiations with Garrett. Diebert's check for the stock purchase was delivered to Garrett by Bartel.

Shortly after the purchase of the SPM, Diebert had a meeting with O'Neill in which O'Neill discussed the origins of SPM with him. Diebert's testimony about this conversation with O'Neill was as follows:

> Q. Other than the issue of thefts, was anything else discussed with Mr. O'Neill?
>
> A. He went over with me the unfair labor practice he was accused of.
>
> Q. What did he tell you, Mr. Deibert?
>
> A. He told me they shut down the plant and that these new companies were formed after the new plant was shut down. Various people owned them, other people than himself, and that he had to pick out one segment of the business to be involved in; he could not be involved in all segments and that he wanted to be in the feed lot business.
>
> Q. Go ahead.
>
> A. He said Sierra Pacific Meat Company was a broker for the cattle, and that all these companies really depended on each other.
>
> In other words, without the brokerage company, he did not have an outlet for his cattle, and without the plant, there was no place to slaughter the cattle. So all the companies did depend on each other, but that he was trying to keep the companies separate.

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[25] Garrett's only income from SPM's operations come from the meat he personally brokered in the Sacramento area.

Q. Did he explain why he was trying to keep them separate? Whey he, Ed O'Neill, was trying to keep them separate?

A. Well, those are my words. He did not want to be involved in an unfair labor practice—I mean, that would be my summation of it.

Q. He told you an unfair labor practice charge had been filed against him?

A. Yes.

Q. And during this conversation, he did say he had closed the plant down?

A. Yes.

Q. And that he wanted to remain in one segment of the business?

A. Yes.

Q. And that was the feed lot operation?

A. Yes.

Q. And that he was dependent on the other companies for the sale and slaughter of his beef?

A. Yes.

Q. He also told you he still controlled O'Neill Limited?

A. He could have.

Q. Did he discuss he was also still involved in the accounting function?

A. Probably.

Q. He told you friends of his had set up the other corporations?

MR. BUTLER. Objection.

JUDGE SCHMIDT: Overruled

THE WITNESS: I would not say he used the word "friends", no.

BY MR. ROSENFELD:

Q. How did he describe the people who set up the other corporations, all of which were dependent upon each other?

A. I don't know if he discussed who the other people were, but I assumed they were business associates and he had known them and trusted them. If that's a definition of "friend"—

JUDGE SCHMIDT: I'm really not interested in what you assume. If he said something that led you to believe that, say what he said.

MR. TICHY: I would move to strike the assumption, Your Honor.

JUDGE SCHMIDT: Sustained.

Q. Mr. Diebert, during the conversation, Mr. O'Neill told you some other companies had been formed at the time he closed the plant; right?

A. Yes.

Q. And he told you he knew the people who had formed the companies?

A. I don't remember him saying that?

Q. He told you, did he not, he was aware of the formation of the other companies?

A. Yes.

Q. Did he tell you he was aware of the formation of the other companies?

A. I don't recall.

Q. Did he not tell you he was at least partially involved in the formation of the other companies.

MR. QUINLAN: I object as to what counsel means by "partially involved". Does he mean in the actual formation of the corporate structures themselves? Or leasing something to somebody? Or what?

I think the question is so vague the answer would be meaningless.

JUDGE SCHMIDT: Overruled.

THE WITNESS: I knew the companies evolved out of former O'Neill company.

MR. ROSENFELD:

Q. That's not an answer to the question, Mr. Deibert. The question is: Did Mr. O'Neill tell you that in the conversation?

A. Mr. O'Neill told me that, yes.

JUDGE SCHMIDT: Now, hold on.

The question, as I understand, the original question was: Did Mr. O'Neill tell you he was partially involved in setting up the other companies? Did he say that or something similar to that to you?

THE WITNESS: No, sir, I don't recall that.

JUDGE SCHMIDT: All right.

BY MR. ROSENFELD:

Q. He told you the new companies evolved out of the old meat plant and its operations?

A. Yes.

Q. Did he tell you how the new companies evolved out of the operations of the old O'Neill Meat Plant?

A. No.

Q. Did he tell you he had nothing to do with the evolvement or evolution of these new companies out of the old O'Neill Meat Company?

A. No, he didn't say anything about that.

Q. But he did discuss briefly, didn't he, how the new companies evolved?

A. I am not sure I understand exactly how they all came about, other than that there was an O'Neill Company. That company shut down and these three or four, however many there are, evolved from that. Exactly how, I don't know. I asked and I don't know that he told me.

Q. Did he tell you why he shut down the company?

A. He was losing so much money he could not afford to continue.

Q. Is that from the thefts?

A. Not at the time, I don't think it was. It was uneconomical, given the labor and I guess the processing. I guess it was an uneconomical operation. He could not compete.

Q. Did you ask him how the other entities made it economical if he was unable to do so?

A. I don't know whether it was at a conversation or later knowledge that I learned this.

Q. Mr. Diebert, I'm interested only right now in what Mr. O'Neill told you.

A. In that particular, no, I don't think he told me.

Q. Was there any general discussion about how the new companies were or were not economical or were able to make a profit?

A. The new companies, Sierra Pacific, did not make a profit, so that I don't know if the other companies

were making a profit or not; I'm not quite sure what the other companies do.

Q. At that conversation, did Mr. O'Neill tell you the companies evolving out of O'Neill Meat Company were making a profit or were not making a profit, and the extent to which they were?

A. No, he did not tell me.

Q. You did discuss the fact Sierra Pacific itself at that point was not making a profit?

A. Yes.

Q. Was there any discussion as to the reason for that?

A. It all revolved, in the discussions, as to the theft.

Q. Did you ask him whether he would be of assistance in your continued operation, or operations of Sierra Meat Company?

A. What type of assistance?

Q. Any kind of assistance, advice.

A. I did not ask him to play a role in management. I did not ask him for any kind of financial backing at that point.

As I became aware of it later, where we were getting our funding, if you will, our liability is that we owed him a substantial sum of money for all the cattle bought from him, sold, and we were unable to repay.

Q. After this meeting, how many more meetings did you have before the end of 1978 with Mr. O'Neill?

As best you can remember.

A. Probably one more.

> Q. Did Mr. O'Neill give you any idea how much money was owed him at that time by Sierra Pacific?
>
> A. I don't know if it was at that time. It was $2 million.

O'Neill did not testify about this conversation. Apart from his presence to give testimony, I never observed Diebert in the hearing room.

b. *The Service and Lease Agreements*

After December 12, 1977, the O'Neill entities were ostensibly connected with the four new entities which allegedly operated the meat plant by the lease agreements that existed with FELC and the service agreements that existed with O'Neill, Ltd. Certain aspects of these arrangements are not indicative of an arm's-length business relationship.

Regarding the service agreements, a comparison of the "computer service agreement" between O'Neill, Ltd. and an affiliated company, FELC, with those that it entered into with SPM, FBP and DTC demonstrates that the FELC agreement is substantially more indicative of an arm's-length relationship. The FELC agreement is a three-page document bearing the logo of the law firm which represented the O'Neill entities. It specifically listed the eight different services that were to be provided under the agreement and the hourly charge for each of these services.[26] The agreement then goes on with separate pro-

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[26] Specifically, Section 2 of the O'Neill Ltd.—FELC computer service agreement provided:

> *Services Provided:* The Service Company will provide the following computer services to Customer:
>
> | | *Per Hour* |
> |---|---|
> | C. P. U. Time | $50.00 Hour |
> | Data Entry | 10.00 Hour |

visions dealing with completion times, defining the property which will be considered that of the customer, the allocation of risk in the storage of materials, the confidentiality of materials, the standard of care that must be exercised by the service company, the manner of billing and payments, the allocation of attorney's fees and costs in the event of an action for enforcement, and a savings clause. Having maintained such an agreement with a subsidiary, one would reasonably expect that at least a similar agreement would have been maintained with unrelated companys such as SPM, FBP and DTC. Quite the opposite was true. The substantive provisions of the SPM-O'Neill, Ltd. service agreement were as follows:

> On Sierra Pacific's request therefore O'Neill agrees to provide *certain record keeping and processing services* for Sierra Pacific subject to the following terms and conditions to wit:
>
> 1. O'Neill agrees and understands that they shall perform said services to the best of their abilities, however it is agreed and understood by and between the parties hereto, and Sierra Pacific expressly agrees that O'Neill shall not be responsible nor liable to Sierra Pacific for said services and that *O'Neill shall not be considered the accountants for, nor the representatives of, Sierra Pacific.*
>
> 2. The term of this agreement shall extend for a period of 90 days, commencing December 21, 1977. Either party may cancel this agreement at any time by giving the other party 5 days notice

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Operations	17.50 Hour
Programming	20.00 Hour
Clerical	10.00 Hour
Accounting	12.50 Hour
Accounting Supervision	17.50 Hour
Administrative	20.00 Hour

in writing of such cancellation. Such Notice shall be deemed given when mailed by certified mail, postage prepaid, to the address appearing below:

Sierra Pacific Meat Company, Inc.
659 "P" Street
Fresno, California 93721
O'Neill, Ltd.
P.O. Box 12226
Fresno, California 93777

3. Sierra Pacific shall, upon presentation of statement, pay to O'Neill a fee for said services. Said fee shall be the costs of O'Neill plus a profit of 10%.

In witness whereof, the parties hereto have executed this agreement this 21st day of December, 1977.

SIERRA PACIFIC MEAT COMPANY, INC.
/s/ Eric Garrett

[Emphasis added.]

O'NEILL LTD.
Lee R. Schultz Secretary

The service agreements that O'Neill, Ltd. maintained with FBP and with DTC were equally vague about the nature of the services to be provided and the charges. Moreover, the testimony of Eric Garrett regarding the manner in which SPM's service agreement came into existence casts further doubt on its legitimacy. Purportedly, Garrett requested the service by a letter dated December 16, 1977. According to Garrett's testimony, that letter arrived at his home in the mail already prepared. He merely signed and returned it. The identity of the preparer was never established. Contrary to the recitation in the letter, Gar-

rett testified that he had never met Lee Schultz.[27] Pursuant to that agreement, SPM was charged in some months in excess of $20,000 for the services performed under the agreement. FBP and DTC terminated the service agreements which they had with O'Neill, Ltd. in approximately April 1978. However, the service performed for those two entities appeared to be limited primarily to the preparation of the payrolls and the daily kill reports. At the time FBP terminated its service agreement, Char Rosenthal, who handled the FBP payroll work while she was an O'Neill, Ltd. employee, started to work for FBP to handle the payroll work. There is no evidence as to where Rosenthal performed these duties after she became an FBP employee. Moreover, the evidence indicated that the daily kill reports continued to be submitted to O'Neill, Ltd. after the DTC and FBP service agreements were terminated.

Other evidence shows that, although the service agreement specifically provided that O'Neill, Ltd. was not to serve the accountant or representative for SPM representative, all the considerable financial affairs of SPM were handled in the offices of O'Neill, Ltd. Thus, Bartel acknowledged that he directed the opening of the SPM bank account, which was opened on December 5, 1977, even before the existence of the service agreement or, for that matter, even before the SPM's articles of incorporation had been executed. SPM's mail was funneled through O'Neill, Ltd. and the checks submitted in payment of accounts receivable were routinely removed and banked by

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[27] Schultz, a former officer of O'Neill, Ltd. did not testify in this proceeding. Although it was represented at the hearing that Schultz was no longer employed by O'Neill, there was no indication that he was unavailable as a witness or that he left O'Neill, Ltd. under circumstances that would make him predisposed to color his testimony about his own activities. Accordingly, it is reasonable to infer that Schultz would not rebut this and other testimony adverse to the Respondents concerning his official activities had he been called to testify.

O'Neill, Ltd. employees. In February 1978, O'Neill made application to the Wells Fargo Bank on behalf of SPM for a line of credit of approximately $2 million. The negotiations over this matter continued into the fall of 1978 without any participation by any official of SPM. On August 11, 1978, immediately preceding the arrests in the kickback scheme, O'Neill personally handled a transaction with Fred Polessi designed to obtain a deed of trust on certain real property of Polessi to secure the Polessi's account receivable of approximately $90,000 with SPM.[28] Although Boragno's name or initials appears on numerous SPM checks and vouchers, he testified that as a practical matter, all of these documents were prepared in the offices of O'Neill, Ltd. and presented to him solely for his signature.

Similarly, the history of the plant lease fails to support a finding that an arm's-length relationship existed between FELC and FBP with respect thereto. Thus, following the cessation of slaughtering operations, O'Neill executed an exclusive listing agreement with a commercial real estate broker in Fresno—Charles Tingey & Associates—wherein the plant was offered for sale or lease. The agreement specified that the broker was to receive a commission in the event the plant was sold or leased but no reservation was made in the listing agreement to cover the contingency posed by the negotiations allegedly already in progress at that time between FELC and FBP for the lease of the plant. Notwithstanding that a lease was finally ex-

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[28] Polessi was implicated in the kickback scheme. O'Neill apparently anticipated that Polessi was about to be arrested along with Ladd and Jensen. Because of the other evidence in this matter concerning the degree of involvement by O'Neill in SPM's routine business affairs, I do not credit O'Neill and St. Louis' testimony that O'Neill secured the deed of trust at St. Louis' request after Boragno and Ladd had failed to act on his request that the do so. Indeed, all witnesses to this incident testified that Boragno accompanied O'Neill to Polessi's place of business, but that O'Neill did all the taking.

ecuted by FBP for the plant and the equipment utilized in the slaughtering operation on December 1—a week after O'Neill executed the listing agreement—no lease commission was paid to Tingey and Tingey testified that he made no claim for a commission. Other aspects of the lease arrangement indicate that normal business prudence appeared to be lacking. Thus, the lease provided for no security to assure performance and was terminable upon the sale of the plant. Likewise, there is no evidence that the lease was ever recorded.

According to the testimony of O'Neill and Bartel, the lease price for the plant and the equipment used in the slaughtering operation to both OMC and FBP was a factor of an appraisal made in 1976 by a professional appraisal firm. Thus, the lease between FELC and OMC was designed to provide a 10-percent annual return on the appraised value of the property. Subsequently, when negotiations were allegedly underway between FELC and FBP, there was supposedly an initial effort by FELC to obtain a 12-percent return on the plant and equipment, but Maxey allegedly negotiated the lease price down to the same price that OMC paid. Although Maxey claims to have carefully considered the initial FELC proposal to him for a few days and to have consulted with his son, an accountant and a real estate consultant, before he made a counteroffer, his initial testimony concerning the basis for the lease price at the hearing appeared to be purposefully vague. Additionally, Maxey's testimony discloses a lack of familiarity with the basic concepts involved in setting the lease price. Thus, Maxey testified:

> Q. And it was Mr. O'Neill who informed you of the figures, verbally; is that correct?
>
> A. He told me what he would like to have.
>
> Q. You don't particularly [recall] whether it was by telephone or in person, but you remember it was Mr. O'Neill who told you those figures?

A. It was in a conversation.

Q. You now remember it was in a conversation?

A. I remember that from the start, either in person or on the phone, like I told you.

Q. It was a conversation, but you don't remember whether it was on the telephone or in person; is that right?

A. Right.

Q. You went to your real estate person and your accountant after you got these figures and then to your son; is that right?

A. Oh, yes. My son does a lot of that for me.

Q. Do you remember what the figures were that Mr. O'Neill gave you?

A. Yes. Roughly. Not exactly. The appraised valuation, I think he wanted twelve times and I think that is the way we came at it—that is the way we came up with the original talking.

Q. I'm not sure what or if I understand what you just said. Would you be a little more specific of what you recall the amount was.

A. That was not the amount we settled on.

Q. I'm not asking that.

A. As best I remember right now, he was asking for twelve times.

Q. The assessed evaluation?

A. Yes.

Q. When you are talking about the assessed evaluation, are you referring to what the tax assessor—

A. (Interrupting) Appraised.

Q. Pardon?

A. Appraised.

Q. What the appraised valuation was?

A. Appraised valuation; yes.

Q. Do—

JUDGE SCHMIDT: You mean the appraised valuation of the tax assessor?

THE WITNESS: Of the land.

JUDGE SCHMIDT: Do you know who appraised it?

THE WITNESS: No. Not at this time.

JUDGE SCHMIDT: But, at least there was a figure presented as an appraisal figure?

THE WITNESS: There was an appraisal figure; yes.

JUDGE SCHMIDT: All right. Proceed.

Q. Did you submit a counter proposal to Mr. O'Neill or anyone else in Mr. O'Neill's facility after you discussed it with your accountant? with your real estate person? and with your son?

A. Yes.

Q. What was the amount of your counter offer?

A. Ten.

Q. Ten what?

A. Ten times instead of twelve.

Q. Ten times the assessed valuation of the property?

MR. FISCHBACH: I think it is appraised value, is the term used previously.

BY MR. ASKIN:

Q. Ten times the appraised value of the property?

A. Right.

Q. Who did you communicate that counter offer to?

A. Either Mr. O'Neill or Mr. Bartel. One or the other of them.

Q. You don't recall which one?

A. Not really.

Q. Had you dealt with Mr. Bartel prior to that in terms of these figures, to your knowledge?

A. I talked to him.

Q. So, prior to the time you gave the counter offer, you had talked to Mr. Bartel about the subject of the lease?

A. Of the money.

Q. About the possibility of leasing the property.

A. Had I talked to Mr. Bartel?

Q. Yes. On this subject?

A. He knew about it.

Q. That's not what I'm asking. Did you talk to Mr. Bartel regarding these negotiations prior to the time you made your counter offer.

A. No; I had not talked to Mr. Bartel prior to making the counter offer.

Q. But, when you made the counter offer, do you remember whether you gave it to Mr. Bartel or Mr. O'Neill?

A. No; I don't recall which one.

Later, when the plant facility was sold to Indio Properties, a San Francisco investment firm, and leased back

to O'Neill, Ltd. and FEB in April 1979, special arrangements were required as an inducement for the sale. O'Neill testified that he negotiated the sale and the lease-back arrangement as part of a package deal and that package deal included O'Neill's personal guarantee of the lease payments for the slaughterhouse facility which Indio leased to FBP. O'Neill's testimony and the documents reflecting that this "package" arrangement was executed on April 3, 1979, directly contradicts the testimony of L. J. Maxey, Jr. who asserted in vague, general testimony that he negotiated the lease from Indio and that at the time he did so he was unaware that O'Neill had guaranteed the lease payments. I cannot credit Maxey's testimony in this regard. If this record demonstrates anything, it demonstrates that O'Neill was far too astute a businessman to sign a "blank check" guarantee for Maxey or anyone else. This conclusion has further led me to discount the testimony of Maxey concerning the initial FBP lease with FELC, which is dated December 1. Although in other circumstances it would be reasonable to treat Maxey's testimony about the basis for the lease price as a mere mistake, I do not believe that such a conclusion is warranted here where other evidence shows that, regarding the lease with Indio, Maxey was a mere functionary. When this factor is considered, together with Mitchell's testimony that he only dealt with either of the Maxeys on one occasion about a minor matter and the record as a whole, it is my conclusion that Maxey was at all times a mere functionary insofar as the operation of the meat plant was concerned.

The circumstances surrounding the selection of office space for SPM when it initially commenced operation is not indicative of its independence of O'Neill influence. That office was located some distance from the meat plant at 659 P Street in Fresno. Garrett testified that he did not make arrangements to rent the offices at this location and that generally he delegated the day-to-day operation of

SPM to Boragno. Although Garrett asserted that he had been at the SPM offices on P Street on a number of occasions, he demonstrated his thorough unfamiliarity with the facility when he testified that he had no recollection whether the building in which the offices were located was a wooden or brick building. The evidence does not establish that either Boragno or Ladd—SPM's other officers—had anything to do with securing the P Street space for SPM.[29] Gary Smith, a relative of the deceased owner of the P Street location, testified with respect to the manner in which arrangements were made for the rental of the facility.[30] According to Smith, he received a telephone call from Bartel in late November 1977, for the purpose of arranging a meeting with O'Neill on December 4 at a country club in Fresno. Smith further testified that at the December 4 meeting O'Neill informed him that he had an acquaintance from "up north" who had a pork business and who wished to lease the P Street location. According to Smith, he was advised O'Neill that if his acquaintance was interested, arrangements for the rental of the facility should be made with their attorney, Richard Andrews. Subsequently, the offices at the P Street location were rented pursuant to negotiations between attorneys St. Louis and Andrews. Boragno testified that after a few weeks of operation, it became apparent that it was inconvenient for Ladd and himself to be located away from the plant and that Bartel arranged for them to have office space in the plant building. There is no evidence that this

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[29] To the contrary, it appears that Ladd was hospitalized for surgery at or about the time that the office space arrangements were made for SPM and did not become actively employed until after his recuperation.

[30] Smith's testimony is fully credited. His demeanor was convincing and there is no evidence that he had any prior or subsequent relationship with any of the parties after the SPM office space rental and was otherwise totally independent of all parties to this case.

space was provided pursuant to any lease arrangement as was the case with the office space provided for FBP, DTC, and JET when the operations initially resumed.

c. *The Personnel and Labor Relations Aspects of the New Entities*

The details of the personnel matters pertaining to the new entities shows evidence of: 1) substantial influence by O'Neill and officials of O'Neill owned enterprises in staffing the new entities, and 2) discriminatory practices designed to insure that the new entities were non-union. The significant aspects of that evidence is as follows:

SPM—Within the first month after SPM commenced operations its staff consisted of Boragno, Ladd, all the former salesmen of OMC, Edward Watts and Daniel Reese. Boragno was SPM's general manager. Ladd was the sales manager, as he had been with OMC. Watts worked in the coolers tagging beef pursuant to the sales orders, as he had done with OMC. Reese was a cattle buyer who, until January 1, 1978, was on the O'Neill, Ltd. payroll.[31] Although some of the duties of the individual salesmen changed after they commenced working for SPM, there were no significant changes in the duties of Boragno, Ladd, Watts and Reese. Likewise, Garrett also found that his ownership of the SPM did not alter his day-to-day activities—he still continued to call on customers in the Sacramento area and phone in his orders to the plant each day. There is no evidence that Garrett played any role in the staffing of the corporation which he founded. By contrast, Boragno credibly testified that Bartel instructed him

[31] Reese did not testify. John Abatti's testimony merits the inference that Reese's duties, following his employment with SPM, did not change and that while employed by SPM Reese was buying cattle on the O'Neill Cattle Feeding account. Abatti was transporting these cattle directly to the meat plant for slaughter. According to Abatti, in late January 1978, he was instructed by Reese to show the live cattle he transported as being consigned to SPM.

as to his duties with SMP and directed him to hire the former OMC salesmen. Boragno also testified that Bartel established the rates of pay for the SPM staff. Boragno also recalled one instance when salesman Joe Stanford asked for a pay increase and he referred that individual to Bartel. Even Garrett felt compelled to request an increase in his commissions from his supposed subordinates in Fresno. Shortly after the meat plant reopened, Boragno received a written instruction from O'Neill directing him to contact a labor lawyer to pressure the Butchers to cease picketing activity at Nob Hill Meats, a customer of OMC and SPM. In August 1978, when the criminal investigation reached its zenith at the plant, the two senior managers of SPM were removed. Ladd, of course, was arrested on August 14. Boragno testified that on August 14, O'Neill came to his office and introduced him to Al Buratto and informed him that Buratto would be replacing him as SPM's general manager. Boragno further testified that O'Neill told him that he would put him to work with Turner. O'Neill and Buratto dispute Boragno's testimony by asserting that Buratto did not replace Boragno until after Boragno was disabled a week later with a heart condition and could not return to work. I do not credit their version of this event where, as here, the directors' minutes of SPM which are dated August 17, 1978, reflect that both Ladd and Boragno were discharged on August 14, 1978.[32] Moreover, the evidence showing that O'Neill recruited Buratto prior to hiring him is not seriously disputed. O'Neill asserted, however, that he engaged in this activity at the request of Garrett's successor, Stephen Diebert but Diebert did not corroborate O'Neill's testimony

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[32] In view of the numerous other clearly manufactured corporate documents in this case, especially with respect to SPM, my reliance on this document is merely as a prior inconsistent written record pertaining to Boragno's discharge. I find that the assertions in this document about the date of Boragno's discharge would not likely comport to Boragno's version of the events if that version was inaccurate.

in this regard. Tami Fowler testified that she was hired as a clerical employee by Burratto in December 1978, and worked until late October 1979, when she was fired by Bartel. In addition,Fowler's testimony paints a graphic picture of the day-to-day operations at the SPM office in the meat plant. According to Fowler, Bartel was frequently in the office area and she often overheard him loudly reprimanding Buratto for SPM's sub-par performance. O'Neill, according to Fowler, was a less frequent visitor to SPM's office, area but she recalled one occasion when he passed through and admonished her about the shoddy filing system in the SPM offices. Boragno testified that he was present on one occasion when O'Neill severely reprimanded Reese for cattle purchases Reese had made following Reese's employment by SPM.

FBP—The evidence related to the initial staffing of FBP centers around the hiring of Ronald Cox. Ronald Cox, who had worked as the plant superintendent for OMC and, as such, was the principal overseer of the production employees in the Butcher's unit, acknowledged was called into Bartel's office and into he presence of O'Neill, Boragno and Bartel, he was informed that he would be working for FBP.[33] Subsequently, Cox was told in the course of a meeting with a similar group that he would be working for Turner. It appears that in the meantime, Cox obtained an application for Mitchell, the former plant engineer for OMC and the principal supervisor of the maintenance employees. Mitchell testified that Cox told him that he would be working for FBP and that he could hire whomever he

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[33] This acknowledgement occurred in a telephone conversation with Attorney Carter shortly before the hearing. Carter recorded the conversation with Cox's consent and that recording was received over the vigorous objections of all Respondents. Following its receipt during the General Counsel's case, Cox was not called by any of the Respondents to impugn the integrity of the recording. Although Turner and the elder Maxey both testified about the hiring of Cox, no contradictory detail was elicited.

wanted, but that the maintenance employees had to work on a non-union basis. Mitchell was successful in recruiting all the former OMC maintenance employees with the exception of one individual who refused to work on a non-union basis. In the meantime, by December 1, 1977, Cox was busy at the offices of the Alpha Agency screening applicants for production jobs on behalf of DTC, a fact which should have made it clear to Cox that he worked for DTC. Nevertheless, other evidence indicates that, to Cox, the new entities had no particular meaning. Thus, the evidence shows that Cox's name appeared on the signature card for FBP's bank account and there is in evidence an FBP check to DTC dated December 21, 1977, for an amount in excess of $12,000 which is signed by Cox.

Having arranged for the former OMC maintenance crew to return to work for FBP, Mitchell said that he next approached Schultz and inquired whom he should speak to about the wage levels for the returning maintenance employees. According to Mitchell, Schultz told him that he (Schultz) would take care of the matter. Mitchell testified that thereafter he acted as an intermediary between Schultz and the maintenance crew, carrying proposals back and forth until an agreement was reached. I do not credit Turner's contrary testimony.

Mitchell also testified that he received instructions from a variety of individuals after the plant reopened. A memorandum from the elder Maxey to Mitchell recites that Mitchell was to "coordinate" his activities with Turner because Maxey was not able to be at the plant as much as he would like to. Indeed, Mitchell testified that the sole contact he had with either of the Maxeys was one occasion when he spoke to the younger Maxey concerning the purchase of some oil. Mitchell further testified that he and the maintenance crew engaged in the repair of the office building areas in the same manner as they had done with OMC. Immediately prior to the December 1977 opening of

the plant, Mitchell said there was an unusual conversation which took place on the steps leading to the main office at the O'Neill facility which involved Turner, O'Neill, and himself. According to Mitchell, O'Neill called to him and he approached the two other gentlemen. At that time a conversation ensued between Mitchell and Turner, but according to Mitchell, O'Neill stood by and fed Turner questions to ask Mitchell. Turner then repeated the questions in a parrot-like manner. Although O'Neill and Turner recalled this conversation, they denied that it occurred as described by Mitchell.[34] Moreover, in November 1978, Mitchell advised Turner that he was quitting his employment with FBP. The following day O'Neill approached Mitchell to discuss why he was quitting his employment and at one point in the extended conversation O'Neill accused him of attempting to hurt "the company."

DTC—Under DTC's agreement with FBP, DTC agreed to provide employees to FBP to perform the services of slaughtering, boning, cutting and storing of beef and other meat products, which was essentially the work performed by employees who had been employed in the Butchers unit at OMC. FBP agreed to pay DTC an amount not to exceed 10 percent of each gross payroll during the life of the agreement. According to Turner and Maxey, there was also an oral side agreement whereby the labor costs of DTC were not to exceed $ 100,000 per month. As a consequence, DTC directly employed the production labor in the slaughtering operation that began on December 12, 1977.

Following the hiring of Cox by DTC, as described above, Cox hired former OMC Slaughter House Supervisors Jansen, Coots, and Kanawyer. Another former OMC em-

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[34] This is not the only evidence of surreptitious conduct designed to create an impression of separateness between O'Neill and the new entities. As I found Mitchell to be a generally reliable witness, I credit his version of this event.

ployee, Bolt, was hired by Cox as the boning supervisor because the former OMC boning supervisor, Labrie, retired at the time OMC closed. In addition, on November 28, 1977, Turner entered into an agreement authorizing Brewer's Alpha Agency to represent DTC regarding all matters relating to wages, hours, and working conditions. According to Cox, he was informed that he should go to Alpha Agency to take applications from prospective employees. Cox appears to have begun interviewing employees on approximately December 1 to hire DTC's production crew. He was assisted by Jansen. In the Ladd criminal proceeding, Cox testified that he was informed that he should not hire more than 40 percent of the employees who had previously worked for OMC. According to Cox's testimony in that proceeding, he was told to do this by Kenneth Huggins of the Alpha Agency so that the employees would not vote the Union back in. Turner likewise testified in the Ladd criminal proceeding that he hired approximately 38 to 40 percent union employees for DTC. In addition, former OMC employees Mike Agular and Joe Toste testified that Cox alluded to the 40 percent limitation on the employment of former OMC employees by DTC when they were seeking employment with DTC. The DTC payroll records reflect that when the plant reopened on December 12, only 40 percent of its non-supervisory employees were former OMC employees. At the instant hearing, Cox, Turner, and Maxey denied that there was any numerical limitation on the hiring of former OMC employees, but that an attempt was made to maintain a 60-40 ratio between unskilled and skilled employees to control labor costs within the $ 100,000 limitation. I do not credit this explanation. The skilled-unskilled explanation fails to explain away Cox's testimony at the Ladd trial that the object of the 60-40 ratio was really to avoid unionization. As such testimony in the Ladd proceeding was not central to the issues there, I find Cox's testimony there to be a truthful explanation of the 60-40 ratio. Moreover, that explanation

conforms to other efforts to insure that the new entities were non-union. Accordingly, I do not credit Huggins' denial at this hearing that he gave Cox such an instruction.

Cox also testified that on one occasion during the period he was engaged in obtaining applications for DTC employees, O'Neill telephoned him and told him that he was doing a good job. Moreover, Cox testified concerning another occasion when Huggins and he went to a nearby law office and met with an attorney (whose name he could not recall) who placed a telephone call to Erwin Bartel. Although O'Neill claimed he was unaware of the location where the Don Turner Corporation was hiring employees, neither O'Neill nor Bartel specifically denied the foregoing assertions made by Cox. There is evidence that Gregory, O'Neill's secretary, was instructed to refer prospective applicants to Alpha Agency.

In approximately February 1978, Bartel concluded that there were too many employees being utilized in the kill floor operation. Notwithstanding that those employees were supposedly DTC's employees, Bartel directed Boragno to layoff some of the employees, and Boragno in turn passed this instruction along to Cox. As a consequence, it appears that some DTC employees were laid off. At a joint meeting that occurred shortly thereafter, Turner angrily asserted that Boragno was unjustified in laying off "his employees." Boragno informed Turner that he was merely passing along an instruction he received from Bartel and he was not responsible for the layoff. A heated argument ensued between Bartel and Turner over who had authority to lay off the slaughter house employees, with Turner asserting that Bartel had no right to lay off "his employees." It appears that O'Neill interjected himself in this dispute to inform Bartel that from that point on he was to let Turner handle the laying off of employees. Considerable testimony was elicited by the Respondents over this confrontation between Bartel and Turner on the premise that this testimony demonstrates that Turner was really operating an

independent business. I find that this incident shows quite to the contrary. The fact that Bartel gave the layoff instruction in the first instance strongly supports the conclusion that, in his mind, the meat plant remained an O'Neill operation. The fact that the instruction was passed down the chain of command as it had existed at OMC (Boragno ostensibly was employed by SPM at the time) is also indicative that in essential respects, the meat plant operation was continuing as before.

JET—Apart from Mr. and Mrs. Abatti, the key JET supervisor was William LeRoy, who had formerly been the OMC dispatcher. It is undisputed that when the new operations commenced LeRoy made all of the job assignments for the JET drivers, handled reimbursements to the drivers, and processed the payroll information for the drivers. Initially, all of JET's drivers were former drivers of OMC, who were laid off when the plant closed in November. As to the hiring of these individuals, the evidence shows that LeRoy arranged a breakfast meeting with several of the drivers by telephoning them in the interim period while the plant was closed. According to driver Jim Laisne, LeRoy telephoned him at his home and asked if he was ready to go to work. After Laisne indicated that he was, LeRoy informed him that the plant was going to open again but things were going to be different; that the trucking would be separate; that John Abatti would be in charge; that the company operating the trucks would be completely separate; that a few of the drivers—but not everyone—was being asked to return and that there would be a meeting at a Tiny's restaurant in Fresno on the morning of December 3 to go into some of the details.

Laisne testified that LeRoy opened the Tiny's restaurant meeting by telling those present that they had been asked to come because the plant was going to open again. One of the drivers present asked if the trucking company would be union or non-union and LeRoy informed the group that it would be non-union. LeRoy went on to explain that the

employees at the new Company would be paid on a mileage basis rather than an hourly basis as they had been previously. In response to a question, Abatti informed those present that he was seeking to obtain an insurance policy comparable to that which OMC had with the Teamsters but that he would not be able to afford eye and dental care.[35] Those present were also told that they would be doing basically the same kind of work as they had previously done at OMC but that JET would not be able to take everybody back at once. Abatti told the group that once the operation was underway it might be possible to haul produce and some other materials for other individuals but their first obligation was to haul for the meat plant. Thereafter, there was a discussion regarding the order in which employees would return to work, and the meeting ended with an understanding about the call back order.

d. *The Financial Aspects of the Resumed Operation*

The preponderence of the evidence shows that in the absence of the financial backing of O'Neill and O'Neill-owned entities, the new entities would have been financially incapable of opening the doors of the meat plant on December 12, 1977. Thus, together the new entities were capitalized for a total of $9000, and the payments for the capital stock of FBP and DTC were not made until May and November 1978, respectively.

Although O'Neill and Bartel testified that the continued existence of OMC looked bleak in the Fall of 1977, the same does not appear to be the case regarding other O'Neill entities. As previously noted, while preparations were being made to close the meat plant on November

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[35] In fact, JET did provide its employees with a health care plan arranged through the Western Meat Packers Association. Abatti testified that he arranged this coverage through Schultz even though he (Abatti) was not a member of the Association.

18, other arrangements for the extensive financing of the O'Neill Cattle Feeding, Inc., were being made with the Wells Fargo Bank. In this respect, the evidence shows that the bank extended a line of credit in the amount of approximately $1,800,000 to O'Neill Cattle Feeding in late 1977, secured by a lien on O'Neill Cattle Feeding accounts receivables and inventory.

The evidence is undisputed that in the first month of SPM's operation it existed solely on the income it generated from the sale of cattle provided by O'Neill Cattle Feeding, which did not demand immediate payment for cattle consigned to SPM for sale. Thus, SPM's records for the period between December 12, 1977, and January 12, 1978, shows that O'Neill Cattle Feeding provided SPM 6,160 head of cattle for a "guaranteed" price of $2,666,916.27. The first evidence of payment by SPM to O'Neill Cattle Feeding is a voucher reflecting a $50,000 payment on December 29, 1977. These same records show that by the time this first payment was made SPM had received cattle valued at $1,809,797.50 for sale. These cattle were being regularly slaughtered in the former O'Neill facility by FBP using DTC labor and the processed meat was transported to SPM's customers by JET.[36] The financial records show that between December 30, 1977, and January 18, 1978, SPM made payments to O'Neill Cattle Feeding in the amount of $1,307,277.82. Based on these records, by January 18, 1978, SPM owed O'Neill Cattle Feeding at least $1,359,638.45. By deferring demand for payments from SPM, substantially all the working capital for the resumed operation was being supplied by O'Neill operations. Because there was a 2-to-4-week lag time between the furnishing of cattle by O'Neill Cattle Feeding and SPM's receipt of payments from customers, O'Neill

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[36] Because of the finite cooler space to store the processed meat, SPM's role in the operation was critical from the further standpoint of disposing of the perishable product to the customers.

Cattle Feeding appears to have encountered difficulties in keeping its payments to Wells Fargo Bank current.

As a consequence, in February 1978, O'Neill made an application at the Wells Fargo Bank on behalf of SPM for a line of credit in the amount of approximately $2 million so SPM could be put on a pay-as-you-go basis with O'Neill Cattle Feeding. There is no evidence that any of the officers of SPM authorized O'Neill to undertake such action or that they even knew such action was being undertaken.[37] Regarding SPM's application, the Wells Fargo Bank assigned an accounts receivable financing credit officer, Doug Anderson, to conduct an investigation of SPM. A significant part of Anderson's report reads in haec verba:

> Subject: Feasibility of Accounts Receivable Financing For:
>
> SIERRA PACIFIC MEAT CO., INC.
> 2336 So. Fruit Ave.
> Fresno, Ca.
>
> Telephone: (209) 486-4611
> Person Contacted: Erwen Bartel, Exec. Vice President
> Type of Business: Dealer of Beef—Distributor of pork products under Wilson Brands.
> BACKGROUND: A California corporation chartered in 1977, commencing operations on 12/12/77. *Although ownership of Sierra Pacific Meat Co., Inc. and Fresno Beef Processors Inc., Slaughterhouse operation is not directly linked to O'Neill's operation,* the purpose of re-organizing O'Neill Meat Co., was to separate the sales and Slaughterhouse functions. O'Neill Meat Company until it was discontinued in September 1977 had been under pressure by the

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[37] It would be absurd to conclude that O'Neill Ltd.-SPM service agreement authorized such action.

union for larger wage demands and increased taxation by various public agencies.

Scope of operation: Sierra Pacific Meat Co., Inc. was created to sell beef and distribute Wilson Pork Products, formerly operated by O'Neill Meat Company, Slaughterhouse operations formerly run by O'Neill Meat Co. are now leased to Fresno Beef Processors Inc., custom kills the cattle purchased from various feed lots on a fixed fee basis. At the present time all of the cattle appear to be purchased for O'Neill by Sierra Pacific and Comingled in O'Neills feed lots to be Slaughtered by Fresno beef processors and sold by Sierra Pacific. Marketing of the beef and pork products is done by the former employees of O'Neill Meat Co., on a commission basis, with sales extending to large chain stores, Independent and other Wholesalers, Terms of Sierra Pacific are Net seven days, however, larger customers are allowed up to twenty eight days without being pressured for payments.

Accounts Receivable Performance Summary: Average turnover days 13; Average percent Credit Memo's (Sierra Pacific) 0.1; Average EOM Accounts Accounts Receivable $1,833,494.

Sierra Pacific Meat Company's records are handled by O'Neill on a system three computer. The records are in good condition and adequate for Accounts Receivable financing and Auditing. [Emphasis added]

Anderson's investigation raised an unexpected problem for other bank officials because it disclosed that the bank's collateral for loans to O'Neill Cattle Feeding was being disposed of without payment. As explained by Randy Shell of Wells Fargo, the object of the line of credit, extended to O'Neill Cattle Feeding in late 1977, was to permit O'Neill Cattle Feeding to purchase cattle from a variety of sources for fattening at the O'Neill feeding pens located

near Five Points, California. Using funds from the line of credit, O'Neill Cattle Feeding paid cattlemen from whom it purchased the cattle within 24 to 48 hours after delivery in accord with the usual custom in the industry. These cattle, however, were being shipped to the meat plant to be slaughtered and were then being sold by SPM. Although the sale by SPM created an SPM account receivable from the customer, until SPM received payment it had no resources to pay to O'Neill Cattle Feeding. In this interim period between the time the fabricated beef was sold and delivered to SPM's customers and O'Neill Cattle Feeding was paid by SPM, the cattle could not be identified with a sufficient degree of specificity as to permit Wells Fargo to enforce a security interest. These circumstances caused the bank to act to protect its position and it did so by placing the O'Neill accounts in its loan adjustment department in April 1978, for the purpose of either liquidating the O'Neill Cattle Feeding loan or arranging some alternative security.

There followed a protracted series of negotiations between Shell on behalf of Wells Fargo and O'Neill on behalf of SPM and other O'Neill enterprises. Shell specifically denied participation in these negotiations by any officer or representative of SPM until the very end when he contacted Diebert essentially for the purpose of executing loan documents on behalf of SPM. The end result of the negotiations was that Wells Fargo agreed to provide SPM with a $2.1 million line of credit for its use in making immediate payment to the O'Neill entities when it undertook to broker O'Neill Cattle. In turn, the bank received a security interest in SPM's receivables. The bank demanded, in addition, that O'Neill personally guarantee the line of credit to SPM, which O'Neill agreed to do in return for SPM's guarantee of the O'Neill Cattle Feeding loan with Wells Fargo. One other portion of the arrangement agreed upon is reflected in a letter from Shell to O'Neill dated October 17, 1978, which bears O'Neill's signature in

acknowledgement. It follows a paragraph dealing with the requirement that O'Neill personally guarantee SPM's line of credit and reads:

> 9. You agree not to create any new entities, change the method or scope of operation of any existing entities, or transfer any assets between related entities accept [sic] for full market value payable in cash, without prior bank approval.

Aside from the issues presented herein as to SPM, FBP, DTC, and JET, there is no evidence that O'Neill had created new entities or changed the method or scope of operations after OMC was established in January 1977. There is no evidence that Wells Fargo was at all concerned about the transition which occurred in January 1977. There is no corroborated evidence that Garrett, Diebert, Boragno, Ladd, or anyone else connected with SPM approved this arrangement in advance. According to Shell, SPM's line of credit at the bank was a part of a package deal. Subsequently, however, the O'Neill accounts were transferred to the Bank of America and a similar arrangement was entered into concerning SPM with the Bank of America. Notwithstanding, other evidence indicates that in 1979 O'Neill, Ltd. made large cash advances to SPM.

Although the evidence shows that separate bank accounts were maintained by the new entities, the evidence concerning the control, use and certain transactions shown by those accounts is not indicative of an arm's-length relationship. As already noted above, SPM's bank account was opened at Bartel's direction at a time when SPM had no business relationship with O'Neill, Ltd. or any of the affiliated O'Neill entities. There is also evidence that Cox, ostensibly employed by DTC, signed a check in the amount of $12,288.77 to DTC, which was drawn on FBP's account on December 22, 1977, at a time when it should have been

abundantly clear that he was not employed by FBP.[38] In addition, Mitchell testified that shortly after the plant opened, he asked Char Rosenthal, in Bartel's presence, when the checks for the maintenance crew could be distributed. Rosenthal passed the question along to Bartel and—according to Mitchell—Bartel responded that he would have to transfer money into that account first. Similar testimony was provided by Boragno. He testified that he complained about the cost of JET's services in June or July 1978, and was told by O'Neill that some of JET's money would be funnelled to SPM. Later, after returning from Pollesi's place of business on August 11, 1978 with O'Neill, O'Neill told Boragno that he had not forgotten Boragno's request to transfer some money from JET to SPM and that he would see that it was taken care of.[39] Although O'Neill and Bartel denied the testimony of Mitchell and Boragno, no effort was made to rebut testimony of this nature with records of the various accounts. Thus, it would have been a simple matter to show that FBP's payroll disbursements came from an account in which regular deposits were made from receipts received for services performed. Various records of SPM and JET were offered in evidence and when the banking transactions of these two entities are compared for comparable periods of time, there is significant evidence that the transactions between these two entities were not regular. Thus, General Counsel's Exhibit 108 is Carol Abbatti's running record of

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[38] The elder Maxey sought to explain this occurrence away as a by-product of the earlier mixup between Turner and himself regarding who would employ Cox. I find Maxey's explanation to be a fabrication especially where, as here, Cox did not corroborate any portion of this testimony.

[39] In fact, in late June 1978, the lease agreement between FELC and JET was voluntarily "renegotiated" to increase the lease price for the equipment leased by JET. Abatti testified, in effect, that he was motivated to agree to such a mid-term modification in order to maintain the goodwill of FELC. Commencing August 15, 1978, JET's lease payments to FELC increased by slightly less than $3600 per month.

the deposits to, and disbursements from, the JET account which was maintained at the United California Bank in Fresno. Among other things, this record shows the bank deposits, the specific checks drawn on the account, and her running balance in the account. It shows that the account was opened with a $1,500 deposit on or before December 19, 1977. On December 19, 1977, six checks—numbered 102-107—were drawn against the account and the running tabulation shows a balance of $393.04 after those checks were deducted from the original $1,500. The following line on Carol Abatti's record shows a deposit to the account in the amount of $15,894.84 and check 108 to Carol Abatti for petty cash in the amount of $322.05 on December 22, 1977. The balance shown after deducting check 108 is $15,965.83 which indicates that the deposit of $15,894.84 occurred after check 107 was issued on December 19, 1977, and at least contemporaneous with the issuance of check 108 on December 22, 1977. There is no evidence that JET had any source of income in this period other than that earned hauling for SPM. SPM's bank statement for December 1977 is in evidence as General Counsel's Exhibit 31. An examination of SPM's bank statement fails to show that a check for the amount of $15,894.83 cleared SPM's account by December 30, the close of the statement period.[40] Other evidence in the form of certain SPM payment vouchers shows that on December 27, 1977, SPM check 025 for $2,892.22 was issued to JET. (General Counsel Exhibit 76). Attached to that voucher is a summary showing that the payment was for freight bills 001-008 dated December 14 and 15, 1977. A similar voucher (General Counsel Exhibit 77) shows SPM check 020 was issued to JET on December 29, 1977, in the amount of $13,002.62 for freight bills 009-036 dated at

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[40] In his testimony, Bartel mentioned another SPM bank account that he alluded to as a "collateral" account. The evidence detailed here, however, makes it clear that SPM's payments to JET were not drawn on that account.

various times in the period from December 15 through December 21, 1977. SPM's bank statement shows that a check in the amount of $2,892.22 cleared that account on December 29, 1977, which indicates that SPM's payments to JET were drawn on that account. There is no evidence that the check, in the amount of $13,002.62 cleared the account before the close of the statement period. However, SPM's two payment vouchers for freight bills numbered 001-036 dated between December 14 and 21, 1977, however, amounted to $15,894.84. Based on the foregoing, it would appear that JET deposited that amount in its account approximately one week before SPM paid those freight bills and it is fair to infer that JET's money came from some source other than SPM. The source of that money is not explained. Moreover, SPM's bank account shows that it did not have over $6,000 in its account until December 23.

Finally, other evidence shows that Bartel and Michael Temer ordered SPM's supplies, and Mitchell testified that Bartel supplied credit references for FBP when Mitchell ordered FBP supplies. SPM did not employ a credit manager. Instead, Foy Foster, an O'Neill Ltd. employee supplied credit advice to SPM and it appears SPM was charged for this service pursuant to the vague service agreement.[41]

4.*Conclusions Concerning the Alter Ego Issue*

Based upon the foregoing evidence, it is my judgment that the record in this case prepondrates heavily in favor of the conclusion that SPM, FBP, DTC and JET constitute the alter ego of OMC and, further, that those four entities together with O'Neill, Ltd. and FELC constitute the alter ego of the entities which operated the meat plant prior to November 18, 1977.

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[41] Although some of OMC's customers were lost in the transition to the new entities, it appears that many of the major accounts were eventually recovered.

Although it may be true that the formal ownership of the new entities was vested in individuals other than O'Neill, the foregoing evidence demonstrates that O'Neill's equitable interest in the operation, which was conducted at the meat plant after December 12, 1977, is so overwhelmingly dominant as to warrant the conclusion that O'Neill's interest was nearly tantamount to ownership. By comparison, the evidence shows that O'Neill effectively contributed the plant and equipment as well as $2 million worth of cattle to establish operations in December 1977, whereas Garrett, the Maxeys, the Turners and the Abattis pledged $9,000 (some of which was not paid until much later) and contributed some of their time. In an isolated context, the evidence with respect to JET's legitimacy is, comparatively speaking, by far the most compelling. Thus, in addition to the ownership aspect, there is evidence that Abatti had previously been engaged in the trucking business albeit not on the scale achieved by JET; that Abatti and his wife drew substantial salaries from JET's income; that JET was licensed as a common carrier by the California Public Utilities Commission (PUC) and charged rates specified by PUC; that unlike OMC, which operated as an in-house carrier, JET employed an independent rater for billing purposes; that JET eventually hauled for other unrelated entities; that JET maintained its bank account at an institution other than that used by the O'Neill entities; and that a substantial portion of JET's insurance business was placed with an agent who had served Abati's other insurance needs. In addition, there is no evidence that O'Neill, or any official of an O'Neill entity, played a direct role in the hiring or discharge of JET's employees or the setting of their wages and benefits. On the other hand, Abatti's own testimony shows that although he was purportedly concerned about the impact the closing of OMC would have on his livestock hauling operation, he did nothing to secure that business from the new entities until after he had made all of the arrangements to lease the

refrigerated units formerly used by OMC and to obtain the processed meat hauling. Although it might be argued that this evidence simply shows that Abatti was seizing a new business opportunity, the fact of the matter is that Abatti's own testimony shows that he leased the refrigerated units before he ever knew whether there would be any processed meat hauling business available to a common carrier from the meat plant. Moreover, the fact that Abatti leased all of the refrigerated units at once, even though it is evident that there was no use for all the units at the time the meat plant reopened and there is no evidence that he was soliciting independent business until much later, as well as the fact that he informed his drivers that their first priority was the meat plant products warrants the inference that Abatti's unusual business risks were of substantial benefit to O'Neill and the other new entities.[42] When these circumstances are considered, together with the vague use agreement and unsecured leases that JET maintained with FELC, the fact that there is evidence that JET's receipts do not coincide with the dispursements of SPM—its only customer at the time—Abatti's predisposition to modify the lease prices upward in mid-term, and the record as a whole, I am satisfied that a preponderance of the evidence establishes that, notwithstanding the evidence of its alleged independence, even JET existed at O'Neill sufferance and for the purpose of achieving the labor relations aims of O'Neill.

In sum, the circumstances shown here merit the inference that the owners of the new entities were nothing more than fronts for O'Neill—a practice which was not the least bit foreign within O'Neill's organizations as evidenced by the manner in which corporate officers of O'Neill organizations were appointed and removed. It is also clear that the new entities were treated as such by the Wells

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[42] In fact, there is no evidence that Abatti even attempted to lease only the units which he would require when JET commenced operating.

Fargo Bank and by Indio Properties. The conclusion that the new entities were mere fronts used by O'Neill and his enterprises to conduct the meat plant operation, is the only explanation provided by this record for the wide variety of circumstances, shown by the evidence discussed above, including:

1. The bizzare lack of interest or activity by Eric Garrett in the affairs of SPM whose income was vital to the existence of the other three entities;

2. The lack of any credible explanation for the degree of involvement by O'Neill, Bartel and other officials of the O'Neill owned enterprises in the day-to-day affairs and policy making decisions of the new entities including significant labor relations matters;

3. The failure of any of the new entities to provide by way of rebuttal to the General Counsel's *prima facie* case convincing evidence of a financial capacity to even undertake an operation such as was conducted at the meat plant after December 12, 1977, or any evidence other than their own self-serving statements that they were truly independent enterprises;

4. The charades practiced to create an impression of separateness even within the Respondents' own house;

5. The unconvincing nature of the Respondents' explanation that the four new entities developed into such a highly integrated operation within such a short time span and with only an insignificant amount of prior planning and coordination.

6. The lack of any managerial or supervisory staff developed independent of the former OMC management and supervision while at the same time disregarding a significant portion of the former OMC production employees;

7. The significant indicia present even before OMC ceased operating the plant that the meat plant would continue operating after the announced closing date to serve OMC's customers.

Apart from the foregoing, there is substantial evidence that O'Neill had become increasingly preoccupied with reducing the financial losses suffered by his business enterprises and that immediately prior to the cessation of operations by OMC, he applied considerable pressure on the labor organizations which represented the meat plant employees to modify the labor agreements which were less than a year old. When this fact is considered together with Cox's testimony at Ladd's criminal trial that effort was made to prevent the re-emergence of the labor organizations in the operation conducted after December 12, 1977, and the further evidence that both JET and FBP employed a quasi "yellow dog" policy regarding the reemployment of the drivers and maintenance employees, the inference is inescapable that the business organizations which operated the meat plant after OMC were primarily an elaborate device designed to avoid the obligations of the labor agreements and the Act. This finding is further supported by the bad-faith nature of the bargaining over the effects of the closing of OMC.

For the foregoing reasons, I find that SPM, FBP, DTC, and JET are simply the alter ego of OMC and, as these four alter ego entities were related to O'Neill, Ltd. and FELC in a manner almost identical to OMC, I further find that O'Neill, Ltd., FELC and the four alter ego entities have been a single employer at all times since the meat plant resumed operating December 1977. *NLRB v. Big Bear Super Markets,* supra; *Circle T Corporation,* supra; *Crawford Door Sales Company,* supra.

5. The Procedural Defense

The Respondents believe that the complaint should be dismissed for procedural reasons on the ground that the

General Counsel had no basis for issuing the amended consolidated complaint after having formally refused to do so. In effect, the Respondent's assert that under the circumstances shown here, the General Counsel lacked authority to revive the charges, sua sponte, after having once dismissed them. In response to this argument, the General Counsel asserts that he properly acted within the scope of the authority vested in him in Section 3(d) of the Act.

Concerning the procedural issue thus raised, the evidence herein shows that the charge in Case 32-CA-828 was initially filed by the Butchers on April 12, 1978. It alleged that "O'Neill Meat Co. and/or O'Neill, Ltd. and/or Food Equipment Leasing Co." violated Section 8(a)(1), (3), and (5) of the Act in the previous six months by changing "the name and style under which business was conducted in order to avoid the negotiated agreement [with the Butchers]" and "engaged in a series of devices or subterfuges to claim separate entity status in order to avoid the [Butchers] agreement."

The charge in Case 32-CA-928 was initially filed by the Teamsters on May 11, 1978, against the same Respondents as were named in the Butchers' charge of April 12, 1978. In addition the basis for the Teamsters charge was precisely the same as that alleged in Case 32-CA-828. Both of the aforesaid charges were duly served upon the Respondents at the Fruit Street address of the O'Neill entities in Fresno, California.

By separate letters dated June 28, 1978, the Regional Director for Region 32 notified the Teamsters and the Butchers (with copies to the charged Respondents) that he was refusing to issue a complaint on either of the charges. The Regional Director's stated reasons were as follows:

> The investigation disclosed that in November of 1977, O'Neill Meat Co. ceased operations and laid off all of its employees. Thereafter several new companies, including Turner Corporation, Fresno Beef Pro-

> cessors, Inc., Sierra Pacific Meat Co., and J&E Transport, Inc., assumed a function of the former O'Neill Meat Co. and began operations at the plant of O'Neill Meat Co. However, there is no evidence that Ed O'Neill, owner of O'Neill Meat Co., has any ownership in the aforementioned companies, nor is there evidence that Ed O'Neill maintains any control of the four new companies. Under these circumstances it cannot be concluded that O'Neill Meat Co. has engaged in a series of devices and subterfuges to claim separate identity in order to avoid bargaining with the union and being bound to the collective bargaining agreement with the union.[43]

Following the dismissal of the charges, the Butchers filed a timely appeal of the Regional Director's action in refusing to issue a complaint with respect to 32-CA-848. No appeal was filed by the Teamsters with respect to 32-CA-928. By letter dated August 24, 1978, the General Counsel sustained the Regional Director's action in refusing to issue a complaint in 32-CA-848. Hence, by the end of August 1978, the proceedings on both charges had been effectively terminated by the General Counsel.

Notwithstanding the foregoing action, the General Counsel by letter dated November 15, 1978, notified the Butchers and the named Respondents that his office was in receipt of "newly discovered evidence" not previously available prior to the August 24, 1978 decision denying the appeal in Case 32-CA-848. The nature of that evidence was not specified. Accordingly, the General Counsel revoked his decision of August 24 and remanded the case to the Regional Director for further processing. By letter dated November 21, 1978, the acting Regional Director notified all of the parties in Case 32-CA-848 that he was

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[43] The quoted language is from the dismissal letter in 32-CA-848. The dismissal letter in 32-CA-928 is practically identical.

rescinding the June 28, 1978 letter refusing to issue a complaint and was reinstating the charge for further processing on the basis of "newly discovered" evidence. The Regional Director took similar action regarding the charge in Case 32-CA-928 on January 18, 1979.

Following the reinstatement of the charge in 32-CA-848, the Butchers amended that charge on January 3, 1979, to allege additional Respondents as parties, namely, SPM, FBP, DTC, and JET. This was the first occasion any of these four entities had been named in any charge. Subsequently, on January 22, 1979, the Butchers again amended the charge in 32-CA-848 for the purpose of alleging Edwin R. O'Neill as a Respondent in his individual capacity and for the further purpose of deleting JET as a Respondent.[44]

On February 8, 1978, the Teamsters amended the reinstituted charge in 32-CA-928 to allege Edwin R. O'Neill, in his individual capacity, JET, and DTC as Respondents in addition to those it had originally charged.

On January 30, 1979 the Regional Director issued a complaint in 32-CA-848 alleging that Edwin R. O'Neill, an Individual, O'Neill, Ltd., FELC, Amalgamated Meat Company, f/k/a OMC, FBP, DTC and SPM violated Section 8(a)(1), (3), and (5) of the Act. Subsequently, separate answers were filed on behalf of each of the Respondents.

On April 27, 1979, the Regional Director issued an order consolidating cases, amended consolidated complaint, and notice of hearing in Cases 32-CA-848 and 32-CA-928. In terms of the named parties, the Teamsters, of course, were added to the proceedings as the charging party in case

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[44] It is reasonable to infer on the basis of the record that the reason for the deletion of JET as a Respondent under the charged filed by the Butchers resulted from the fact that JET never performed any functions that required it to employ individuals in work categories previously represented by the Butchers.

32-CA-928 and JET was added to the list of Respondents. The amended consolidated complaint alleged that the Respondents had collectively violated Section 8(a)(1), (3), and (5) of the Act. Again separate answers were timely filed by each of the named Respondents denying the alleged unfair labor practices and asserting certain affirmative defenses.

Regarding the affirmative defenses, the answers uniformly alleged that the action of the General Counsel in issuing the instant complaint was precluded by Section 10(b) of the Act. All of the Respondents except FBP also alleged the following as an affirmative defense:

> AS A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, the Board is precluded by application of its own Regulations, the Administrative Procedures Act and general equitable principles from taking further action in this matter.

Additionally, JET alleged that it had not been served with a copy of the charge and Edwin R. O'Neill alleged that the action against him was barred by the principle of latches. The remaining affirmative defenses relate to the sufficiency of the complaint to state a cause of action; a failure in JET's instance of the Teamsters or the Butchers to demand recognition or bargaining as well as a lack of majority by either union among the JET employees; and an allegation by DTC and the O'Neill Respondents that the relief sought by the Board would violate the Section 7 rights of affected employees, all of which I find lack merit.

The amended consolidated complaint alleges that the named Respondents constitute a single employer, or a joint employer, and that all are alter egos of one another. The service of a charge upon anyone of a group of employers that legally constituted a single employer or an alter ego constitutes adequate service of the charge as to all in that group. *Sturdevant Sheet Metal & Roofing Co., Inc.*, 238

NLRB 186 (1978). The evidence here shows that the original charge in both cases was properly served upon O'Neill Meat Company, O'Neill, Ltd. and Food Equipment Leasing Company within the six-month period provided by Section 10(b). As it is my conclusion that the employing entity comprised of O'Neill Ltd., FELC, FBP, DTC, SPM, and JET constitute an alter ego of the employing entity comprised of O'Neill, Ltd., FELC and OMC regarding the operation of the meat plant, I find that the charges were timely served on all of the named Respondents and that this proceeding is not barred by Section 10(b) of the Act concerning any of the Respondents.

Regarding the affirmative defense that the General Counsel and the Regional Director lacked authority to revoke the original dismissal of the charges and to reinstate them, it is argued that they lacked a basis for such action as no formal motion for reconsideration was filed pursuant to Section 102.19(c) of the Board's Rules and Regulations.[45]

On the basis of the Supreme Court's holding in *Arizona Grocery Co. v. Atchison, Topeka, & Santa Fe Railway Co.*, 248 U.S. 370 (1932), the Respondents contend that the

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[45] Section 102.19(c) of the Board's Rules and Regulations provides as follows:

> (c) The general counsel may sustain the Regional Director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct that the Regional Director take further action; the General Counsel's decision shall be served on all the parties. A motion for reconsideration of the decision must be filed within 10 days of service of the decision, except as hereinafter provided, and shall state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal shall be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

General Counsel, the Regional Director and all parties to the cases were obliged to strictly follow Section 102.19(c). As the Butchers and the Teamsters failed to show: 1) that they filed a motion for reconsideration under Section 102.19(c) of the Board's Rules and Regulations; 2) that there was any newly discovered evidence following the dismissal of the charges; or 3) that any newly discovered evidence was unavailable prior to the General Counsel's decision on appeal in Case 32-CA-848 and the Regional Director's action in 32-CA-928, no basis existed for reopening either case. Under these circumstances it was argued that it was inappropriate to reinstate the charges because the 6-month limitation period had expired. In support of this argument, the Respondents also relied on *NLRB v. Lane Aviation Corp.*, 615 F.2d 399 (6th Cir. 1980); *Heat Research Corp.*, 243 NLRB 206 (1979); *Eltra Corp.*, 225 NLRB 1 (1976); *Douglas Aircraft Co.*, 202 NLRB 305 (1973); and *Forrest Industries, Inc.*, 168 NLRB 732 (1967). In addition, certain of the Respondent's called attention to *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), which holds contrary to the general proposition they advanced here but argues that the holding in that case is inconsistent with Section 10(b) of the Act—the 6-month statute of limitations provision.

It is obvious from the circumstances of this case that the General Counsel concluded shortly after the denial of the Butchers' appeal that that determination was mistaken. Following this conclusion, the Regional Director followed suit regarding the Teamsters charge. The timing of those conclusions are not surprising inasmuch as it was shown that the Butchers did communicate with the General Counsel after the Butchers' appeal was denied, and that Ladd had been arrested and had commenced providing information to representatives of the Butchers. Considering the nature of Ladd's testimony at the hearing herein and the fact that the Respondents did not attempt to impeach Ladd by showing that his hearing testimony was

a recent fabrication not contained in his prehearing statements, it is fair to infer in these circumstances that the information provided by Ladd came to the attention of the General Counsel and caused concern about the validity of his determination. The action by the General Counsel regarding the Butchers' charge and the Regional Director regarding the Teamsters' charge, was initially for the purpose of conducting additional investigation. The first complaint did not issue until much later. Hence, even assuming that the "new evidence" that the General Counsel alluded to in reopening the Butchers' charge was grounded upon the disclosures of Ladd, it would be difficult to conclude that the General Counsel and the Regional Director arbitrarily seized on such information in order to issue a complaint against the Respondents.

In *California Pacific Signs, Inc.*, supra, the General Counsel reinstated a timely filed charge some ten months after the alleged unfair labor practice, notwithstanding that he had denied the charging party's appeal and the charging party made no formal motion for reconsideration. In refusing to dismiss the complaint ultimately issued by the General Counsel on the ground that the reinstatement of the charge was barred by Section 10(b) of the Act, the Board reasoned:

> Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of a charge with the Board. This section, however, relates only to the actual filing of charges and, once a charge has been timely filed, the control over, and disposition of, that charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act. The General Counsel thus has virtually unlimited discretion to proceed on such timely filed charges as he deems fit and, in the absence of a showing of abuse of discretion, the Board will not interfere with General Counsel's exercise thereof. This is not to suggest that

> a charging party may file a charge, voluntarily withdraw it, and subsequently reinstate it more than six months later.
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> . . .
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> [T]he charge here was neither voluntarily withdrawn by the Charging Party or reinstated at the Charging Party's request. Rather, the General Counsel, relying on newly discovered evidence, exercised the discretionary authority given to him by Section 3(d) of the Act and reinstated the charge. As previously stated, the Board will not interfere with the General Counsel's exercise of his discretionary authority unless it can be shown that such authority was abused. Respondent here has not alleged, much less proved, that the General Counsel, in reinstating the charge, abused his authority. In the absence of such proof, we find the reinstatement of [the] charge was proper and not time barred by Section 10(b) of the Act. Accordingly, we shall dismiss the Respondent's exception. [Footnotes and citations omitted.]

The circumstances shown here require a careful balancing of the strictures of Section 10(b) of the Act with interests of justice. On the one hand, after rectifying his initial mistake in dismissing the instant charges, the General Counsel went forward to prove—in my judgment—a massive and deliberate violation of the Act. On the other hand, parties in proceedings before the Board are entitled to rest assured at some point that the proceeding is over and further action on such conduct is time barred. In *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), the Supreme Court observed that the policies underlying Section 10(b)of the Act were:

> . . . to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere,

> and recollections of events in question have become dim and confused . . .

Nevertheless, it also is a well-established proposition that public officals are typically vested with the discretion to reconsider prior mistaken administrative actions to serve the interests of justice. *NLRB v. Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944), cert. denied, 321 U.S. 795 (1944), and cases cited therein.

Contrary to the contention of the Respondents that *California Pacific Signs*, supra, represents, in effect, a subterfuge employed by the Board to avoid the effects of Section 10(b), it is my conclusion that the Board's decision there represents a reasoned effort to accommodate the foregoing legal policies. This judgment is borne out by other similar cases. Thus, in *Forrest Industries*, supra, and *Douglas Aircraft*, supra, the Board specifically acknowledged that the General Counsel was vested with discretion in discharging his responsibility under Section 3(d) of the Act, but it declined to treat those cases on their merits because it felt the circumstances did not warrant disregarding the limitations period. On a petition for review in *Douglas Aircraft*, the Court of Appeals promptly disagreed and remanded the case to the Board for further proceedings on the merits. See *Mourning v. NLRB*, 505 F.2d 421 (D.C. Cir. 1974). In other circumstances the Courts have enforced the Board's orders that approved the General Counsel's actions in reinstating a dismissed charge long after the expiration of the statute of limitations period where it was shown that such action was consistent with the overall purposes of the Act. *NLRB v. Iron Workers Local 272*, 427 F.2d 211 (5th Cir. 1970). Even less compelling is *NLRB v. Central Power & Light Co.*, 425 F.2d 1318 (5th Cir. 1970).

Moreover, the Board was careful in its *California Pacific Signs* decision to emphasize the distinction presented by a dismissed charge and a withdrawn charge. In the

past, the courts have been critical of the Board for permitting, on occasion, the reinstatement of a withdrawn charge. *NLRB v. Silver Bakery of Newton*, 351 F.2d 37 (1st Cir. 1965); *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964). The difference between the nature of a dismissed charge and a withdrawn charge is not without significance. A withdrawn charge is disposed of without an official determination on the merits and is often the result of a totally voluntary act by the charging party. By contrast, the dismissal of a charge by the General Counsel represents the exercise of his authority pursuant to Section 3(d) of the Act which is widely regarded as unreviewable. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Hence, the situation posed by the dismissed charge always presents the potential for the eternal perpetuation of error by the General Counsel in the exercise of his official duties unless the General Counsel is vested with the inherent discretion to reinstate a dismissed charge for further consideration.

From the foregoing, I cannot impugn to the Board the ulterior motives which the Respondents seem to see in the *California Pacific Signs* decision. On the contrary, it would appear that the Board's careful balancing of the various policies involved in these situations warrant judicial approval. Compare *Bill Johnson's Restaurants, Inc. v. NLRB*, 660 F.2d 1335 (9th Cir. 1981) Applying *California Pacific Signs* to the facts here, I find that the General Counsel was justified in reinstating these cases. The Respondents here have failed to show how the General Counsel abused his discretion, and make no claim that they were prejudiced in the presentation of their defense by the destruction of records, the unavailability of witnesses or the inability of witnesses to recall events. On the contrary, several of the defense principals here testified in the Ladd case concerning many of the events and circumstances that are highly pertinent in this case. Hence, I find it difficult to see how the two and one-half month lapse between the

General Counsel's action on the Butchers' appeal on August 24, 1978, and the reinstatement of the charge for further processing on November 15, 1978, can be said rationally to be a sufficient period to cause materials and memories significant to the defense to vanish. I am likewise satisfied that the Respondents' technical argument concerning Section 102.19(c) of the Board's Rules and Regulations lacks merit. A careful reading of the Supreme Court's opinion in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway*, supra, discloses that the Court there was dealing with what has come to be known in administrative law as a "substantive" rule, i.e., a maximum rate, as opposed to an agency procedural rule similar to Section 102.19(c). See, *Chrysler Corp. v. Harold Brown, Secretary of Defense*, 441 U.S. 281, 301 (1979). Although it is true that procedural rules may and do occasionally affect substantive rights, an agency has discretion to apply its procedural rules to achieve a just and legitimate purpose. *Ranger v. F.C.C.*, 294 F.2d 240 (D.C. Cir. 1961). As it is my conclusion that the General Counsel acted to reopen the dismissed charges in this case to reform his earlier mistake in dismissing them, I find that it was unnecessary for him to await the filing of a 102.19(c) motion for reconsideration before doing so. For the foregoing reasons, I find that the charges in Cases 32-CA-848 and 32-CA-928 were timely filed and that the complaint herein is not barred by Section 10(b) of the Act or by operation of the Board's Rules and Regulations, as claimed.[46]

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[46] To the extent that the defense of latches has been proffered, I similarly find that defense lacks merit. *W.C. Neighbors*, 134 NLRB 1078 (1961), affd. 323 F.2d 686 (5th Cir. 1964).

6. Concluding Findings

Having concluded that the employing entity consisting of O'Neill, Ltd., FELC, SPM, FBP, DTC, and JET constituted an alter ego of the employing entity previously comprised of O'Neill, Ltd., FELC, and OMC when the meat plant resumed operations in December 1977, and that the Respondent's procedural defenses lack merit, other conclusions follow logically. See *Circle T Corporation,* supra, at 249-250.

As noted, the object of supplanting OMC with SPM, FBP, DTC, and JET in the makeup of the employing entity was designed primarily to avoid the existing labor agreements and the obligation to deal with the designated employee representatives. Accordingly, any actions against employees adversely affecting their hire or tenure or term and condition of employment to achieve this purpose are, ipso facto, motivated by a discriminatory purpose. Hence, the Respondents' actions in terminating any employee regardless of whether or not the employee was a member of the bargaining units represented by the Butchers or the Teamsters for the object of implementing this discriminatory object or plan violates Section 8(a)(3) of the Act. Accordingly, I find that *all* employees who were terminated in November 1977, in furtherance of the Respondents discriminatorily motivated plan were discriminated against within the meaning of Section 8(a)(3) of the Act. I further find that by refusing to reinstate all such employees to their former positions, when the Respondents resumed the operation of the meat plant on December 12, 1977, was motivated by the same discriminatory purpose and also violated Section 8(a)(3) of the Act.

It is my conclusion that O'Neill, Ltd., FELC, and OMC constituted a single employer of the meat plant employees at all times between January 1, 1977, and November 23, 1977. This conclusion leads to the further conclusion that the collective bargaining agreements executed by OMC

with the Butchers and Teamsters in February and April 1977, respectively, were binding on all of the business enterprises comprising the single employer. It follows that when the employing entity was supplanted in late 1977 with an alter ego consisting of O'Neill, Ltd., FELC, SPM, FBP, DTC, and JET, the alter ego employing entity was likewise bound to the aforementioned collective bargaining agreements. In addition, by resuming operations in December 1977 without applying the terms and conditions contained in those collective agreements it is reasonable to conclude, as I have, that the alter ego employing entity effectively repudiated the collective agreements. Such conduct violates Section 8(a)(5) of the Act. Similarly, there is no dispute about the fact that the alter ego employing entity engaged in no bargaining with either the Butchers or the Teamsters in establishing either the initial or any subsequent wages, hours, or other terms and conditions of employment as it was obliged to do. Accordingly, I find that the Respondents violated Section 8(a)(5) of the Act by unilaterally altering the wages, hours, benefits and other terms and conditions of employment when the operations resumed in December 1977. Finally, the evidence here merits the inference that the Respondents declined to otherwise recognize and deal with both the Butchers and the Teamsters as the representative of the employees in the units found appropriate herein. I find that such conduct also violated Section 8(a)(5) of the Act.

7. Edwin R. O'Neill's Individual Liability

Heretofore, the conclusions have treated the liability of the various business enterprises that are named as the Respondents. The complaint also names Edwin R. O'Neill as a Respondent in his individual capacity. At the conclusion of the General Counsel's case, Respondent O'Neill moved for dismissal of the complaint insofar as it alleged him individually as a Respondent and I deferred ruling on that motion until this decision.

The General Counsel argues that the facts here warrant the conclusion that O'Neill's control over the other Respondents here and his individual conduct in the commission of the unfair labor practices warrants "piercing the corporate veil" to impose liability on O'Neill individually in order to prevent inequity and the frustration of the policies of the Act. Relying on *NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960), and its progeny, Respondent O'Neill argues that he should not be held personally liable when, as here, there is no evidence that he diverted any of the assets of any of the corporations for his own personal gain. O'Neill also asserts that any conclusion that the corporate entities involved here were mere shells used to hide O'Neill's personal assets would not be warranted and, therefore, piercing the corporate veil grounded on such a theory would not be justified.

The findings made above show that O'Neill owned substantially all of the stock of O'Neill, Ltd. and that the other O'Neill enterprises were subsidiaries of that corporate entity. Even the insignificant remaining portion of the O'Neill, Ltd. stock held by the employee stock ownership trust is subject to O'Neill's domination where, as here, there exists a requirement that the trustees of that trust be an employee of the O'Neill entities. The previous findings also show that O'Neill completely dominated the various corporate entities; that he changed the character of some entities; that he activated and deactivated corporate entities at will; and that he changed the officers of his corporate entities (none of whom held any stock whatsoever) at will. O'Neill himself testified in this case that the object in changing the name of OMC after it dropped out of the picture in the meat plant operation was due to the anticipated bankruptcy of that corporation and his personal desire that the O'Neill name not be publicly stigmatized in this fashion. In addition, with respect to the four new entities which came into being in November and December 1977, the findings made show that the

formal owners of these corporate entities were all former business associates, of one kind or another, and their wives. Those corporations literally owed their economic life to O'Neill's willingness to risk the assets of the entities that he owned. The evidence is overwhelming that SPM, which was the financial keystone of the four new entities, was simply abandoned—lock, stock and barrel—by Eric Garrett and Stephen Diebert to the control and use of O'Neill owned enterprises. Additionally, O'Neill risked substantial amounts of his own personal assets by guaranteeing the loans of SPM and the lease of FBP to assure their continued presence and to avoid a financial calamity for the corporate entities that he owned. The overall objective of this conduct was designed to repudiate burdensome labor agreements and the obligation to deal with the employee representatives.

The foregoing findings demonstrate conclusively that O'Neill personally was the dominate figure in the plan of evasion that I have described above and that he committed substantial personal assets to achieving this goal. The findings also demonstrate a proclivity to abuse the corporate form on O'Neill's part to aid and abet his unlawful objectives. Accordingly, I find that in the absence of imposing personal liability upon O'Neill for the unfair labor practices that have been found, it is most likely that the remedy provided and the purposes of the Act will be totally frustrated. Based upon the entire record herein, I find O'Neill is the alter ego of O'Neill Ltd. and its subsidiaries and is individually responsible for the unfair labor practices herein. *Carpet City Mechanical Company, Inc.*, 244 NLRB 1031, 1034 (1979); *Certified Building Products, Inc.*, 208 NLRB 515 (1974); *Ogle Protection Service, Inc.* 147 NLRB 545, 546, fn. 1 (1964); *Industrial Fabricating, Inc.*, 119 NLRB 162 (1957).

IV. The Effect of the Unfair Labor Practices On Commerce

The activities of Edwin R. O'Neill, An Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J&E Transport, Inc., set forth above, occurring in connection with their operations, described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to cause, and have caused to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. Conclusions of Law

1. Edwin R. O'Neill, An Individual; O'Neill, Ltd.; Food Equipment Leasing Company; and Amalgamated Meat Co., f/k/a O'Neill Meat Company, constituted a single employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act at all times between January 1, 1977, and November 23, 1977.

2. At all material times after November 23, 1977, Edwin R. O'Neill, An Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J&E Transport, Inc. have been the alter ego of O'Neill, Ltd.; Food Equipment Leasing Company; and Amalgamated Meat Co., f/k/a O'Neill Meat Company and have been a single employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Ware-

housemen & Helpers of America are each a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material, United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America have been the exclusive collective-bargaining representatives of the employees in the appropriate units described below within the meaning of Section 9(a) of the Act:

> United Food & Commercial Workers Union, Local 126, AFL-CIO: All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clericals, guards and supervisors as defined in the Act.
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> . . .
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> General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America: All Drivers employed at the O'Neill Meat Plant in Fresno, California; excluding all other employees, guards and supervisors as defined in the Act.

5. By terminating the employees of the O'Neill meat plant in Fresno, California, on or about November 18 and 23, 1977, for the purpose of avoiding the terms and conditions of labor agreements then in effect and to avoid certain obligations under the Act, Edwin R. O'Neill, An Individual; Food Equipment Leasing Company; and Amalgamated Meat Co., f/k/a O'Neill Meat Company violated Section 8(a)(1) and (3) of the Act.

6. By refusing to reinstate the employees employed at the meat processing facility described above in paragraph 5, Edwin R. O'Neill, An Individual; O'Neill Ltd.; Food Equipment Leasing Company; Fresno Beef Processors,

Inc.; Don Turner Corporation; Sierra Pacific Meat Company; and J&E Transport, Inc., violated Section 8(a)(1) and (3) of the Act.

7. At all times after November 18, 1977, Edwin R. O'Neill, An Individual; O'Neill, Ltd.; Food Equipment Lesing Company; Amalgamated Meat Co., f/k/a O'Neill Meat Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J&E Transport, Inc., violated Section 8(a)(1) and (5) of the Act by repudiating, or causing to be repudiated, the collective agreements then in effect and applicable to the employees in the units described above in paragraph 4; by unilaterally altering the wages, hours, benefits and other terms and conditions of employment of the employees in the units described above in paragraph 4 of the Act; and by refusing to recognize and bargain in good faith with the exclusive representatives of the employees employed in the units described above in paragraph 4.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. The Remedy

Having found that Edwin R. O'Neill, An Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporations; Sierra Pacific Meat Company, Inc.; and J&E Transport, Inc. (the Respondents) engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and that they take certain affirmative action to effectuate the policies of the Act.

The Respondents shall be required to offer immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all employees terminated as a

result of the November 1977, closure of the O'Neill meat plant—including those employees who were subsequently hired on and after November 23, 1977, since, as discriminatees, they are entitled to offers of reinstatement and not simply offers of employment. *D.R.C., Inc.*, 233 NLRB 1409, 1421 (1977); *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 420 (1977). The Respondents shall dismiss, if necessary, anyone who may have been assigned or hired to perform the work which they had been performing prior to their termination in November 1977. The Respondents shall be required to make these employees whole for all losses they suffered by reason of their unlawful terminations.[47] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Additionally the Respondents shall be required to make whole all employees for any losses sustained by the failure to apply the terms and conditions of the above described collective-bargaining agreements to employees working for them on and after November 23, 1977. Backpay due pursuant to this latter requirement shall be computed in a manner consistent with the Board's policy in *Ogle Protection Service*, supra. Interest on all backpay is to be paid on the amounts owing and shall be computed in the manner prescribed in *F.W. Woolworth*, supra, and *Florida Steel Corporation*, 231 NLRB 651 (1977). Also generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962). To the extent that it is necessary to reimburse any trust funds provided under the aforesaid collective bargaining agreements in order to ensure that employees are fully made whole, such payments, together with any interest thereon, shall be computed in the manner provided in *Merryweather Optical Co.*, 240 NLRB 1213 (1979) and *Pullman Building Co.*, 251 NLRB 148 fn. 3 (1980). The Respondents shall also make the Butchers and the Teamsters whole for all ini-

[47] As used "make . . . whole for all losses" includes backpay, benefits and all other forms of reimbursement cognizable under existing Board policy.

tiation fees and dues they would have received but for the Respondents' failure to apply the terms of the aforesaid agreements to the appropriate employees on and after November 23, 1977, together with interest thereon. *Ogle Protection Service, Inc., supra.* The Respondents shall also commence immediately to give effect to the 1977 collective bargaining agreements with the Butchers and the Teamsters and maintain the terms and conditions of employment contained in those agreements in effect until agreement is reached through collective bargaining on new terms and conditions of employment of the unit employees or a bona fide impasse is reached in such negotiations. The Respondents shall also bargain, on request, with the Butchers and the Teamsters regarding the employees in the units represented by those labor organizations.

In addition the Butchers assert that there should be additional, special remedies to restore the status quo ante. As I have found that the bargaining which was conducted over the effects of the closure on November 23, 1977, were a part of the overall plan to implement the alter ego scheme here, and that they were otherwise conducted in a manner inconsistent with the requirement of good faith, the Butchers requests that its representatives be reimbursed for the expenses incurred to engage in such negotiations is granted. However, the Butchers further requests that a remedial order for reimbursement of litigation expenses is denied. In my judgment the procedural defenses discussed above cannot be deemed "frivilous". Accordingly, the litigation expense remedy would be unwarranted. *Hecks, Inc.,* 215 NLRB 765 (1974); *Tiidee Products, Inc.,* 194 NLRB 1234 (1972). The Butchers' request for a broad remedial order is granted where, as here, the nature of the violations of the Act demonstrates a general disregard for its employees' fundamental statutory rights which caused the employees to suffer severe repercussions. *Hickmott Foods, Inc.,* 242 NLRB 1357 (1979). The Butchers' further requests that the remedial order herein require

the dissolution of Sierra Pacific Meat Company, Inc., Fresno Beef Processors, Inc., Don Turner Corporation, and J&E Transport, Inc. as corporate entities; that the assets of O'Neill Meat Co. be restored; that a constructive trust be placed on any dividends and owners salaries of Sierra Pacific Meat Company, Inc., Fresno Beef Processors, Inc., Don Turner Corporation, and J&E Transport, Inc.; that liability extend to Eric Garrett, Steven Diebert, Louis James Maxey, Jr., James Maxey, Donald and Jacquline Turner, John and Carol Abatti and Kristan O'Neill in their individual capacities; that all applicants for reemployment screened at the Alpha Agency be treated as discriminatees; that mileage allowed as an interim expense in determining backpay be computed at 30 cents per mile; that the wage and benefit levels (including fund contributions) be periodically increased over the backpay period commensurate with the increase in the Consumer Price Index; that I recommend the disbarment of the Alpha Agency from practice before the Board; that the attached notices be required to be prominently posted in certain of the Respondents' attorneys offices and the offices of Alpha Agency; and that O'Neill should be required to read the attached notice to employees, are denied as punitive, unwarranted or unnecessary in view of the other remedies described above. The Respondents shall be required to post copies of the notice to employees attached as Appendix A in the meat plant and to mail a copy of such notice to the last known address to all employees terminated on or about November 18 and 23, 1977.

On these findings of fact and conclusions of law on the entire record, I issue the following recommended[48]

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[48] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All outstanding motions inconsistent with this reco-

ORDER

The Respondents, Edwin R. O'Neill, An Individual, O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co., f/k/a O'Neill Meat Company; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J&E Transport, Inc., Fresno, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, in the contractual bargaining units heretofore found appropriate in Conclusion of Law 4, above.

(b) Deciding to close, closing, and reopening facilities under a different name, in an effort to terminate existing bargaining relationships and to escape the obligations imposed by collective-bargaining agreements.

(c) Failing and refusing to apply to all their employees in the aforesaid contractual bargaining units all terms and conditions of employment contained in the collective bargaining agreements executed by O'Neill Meat Company in February and April 1977, absent the express written consent of United Food & Commercial Workers Union, Local 126, AFL-CIO or General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

(d) Terminating operations, replacing, discharging, refusing to reinstate, or otherwise discriminating against em-

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mmended Order are denied. The General Counsel's unopposed motion to correct the record (Appendix B, omitted from publication) is granted except as to item (4). General Counsel Exhibit 119 and DTC Exhibit 14 are rejected as not adequately authenticated.

ployees regarding hire or tenure of employment or any term or condition of employment for engaging in activities on behalf of a labor organization or for engaging in activity protected by Section 7 of the Act.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) On request, recognize and bargain collectively with United Food & Commercial Workers Union, Local 126, AFL-CIO and General TeamstersLocal 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of their employees employed in the bargaining units heretofore found appropriate in Conclusion of Law 4, above.

(b) Apply the terms and conditions of the aforesaid collective-bargaining agreements with United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America to the employees employed in appropriate bargaining units.

(c) Make all employees, United Food & Commercial Workers Union, Local 126, AFL-CIO and General Teamsters Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and any appropriate trust fund whole for all losses suffered as a result of the failure to apply the terms and conditions of the aforesaid collective-bargaining agreements to employees employed in the aforesaid bargaining units as set forth in the remedy section of this decision.

(d) Offer to all employees terminated as a result of the closure of the O'Neill meat plant on November 18, 1977, immediate and full reinstatement to their former positions

of employment dismissing, if necessary, anyone who may have been hired to perform the work that they had been performing prior to the date on which they were terminated or, if their former positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for all losses suffered as a result of the discrimination against them, in the manner set forth above in the remedy section of this decision.

(e) Reimburse United Food & Commercial Workers Union, Local 126, AFL-CIO for the expenses that labor organization incurred to engage in bargaining over the effects of the closure of the meat plant on November 18, 1977.

(f) Preserve and, on request, make available to the Board or its agents all payroll and other records necessary to compute the backpay, other reimbursements and reinstatement rights set forth in the remedy section of this decision.

(g) Post at the Fresno, California, facility copies of the attached notice marked "Appendix A."[49] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained by them for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Mail copies of attached notice marked "Appendix A"—signed in the same manner as specified in (g), above—

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[49] If this Order is enforced by a judgement of a United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

to the last known address of all employees terminated as a consequence of the closing of the meat plant on November 18, 1977.

(i) Notify the Regional Director in writing, within 20 days from the date of this Order what steps Respondent has taken to comply.

Daniel F. Altemus, Esq., for the General Counsel.
George J. Tichy, II and *Michael J. Hogan, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for Respondent O'Neill, Ltd.
William A. Quinlin, Esq. (Quinlan, Kershaw, Fanucchi & Hoffman), of Fresno, California, for Respondent Don Turner Corporation.
Howard A. Sagaser, Esq. (Jory, Peterson & Sagasen), of Fresno, California, for Respondent J & E Transport, Inc.
David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for Charging Party Food and Commercial Workers.
Barry J. Bennett, Esq., of Fresno, California, for General Teamsters Local 431, the Charging Party.

SUPPLEMENTAL DECISION

I. The Board's Remand

William L. Schmidt, Administrative Law Judge. On 1 August 1985, the Board issued an order remanding this matter for further consideration of the 10(b) issues. I again conclude that the charges in this case are timely. Set forth below are my findings and conclusions—factual and legal—regarding the issues on remand.

A. *The Prior Proceedings*

I issued a Decision and Order in this case on 30 March 1982 (JD-(SF)-46-82). Evidence in the original proceeding showed that the General Counsel reinstated the charges—previously dismissed—more than six months after the clos-

ing and reopening of the meat processing plant operated by the Respondents—the subject matter of the General Counsel's complaint.[1] The Respondents' each filed answers alleging that the General Counsel lacked authority to reinstate the charges under Section 10(b) of the Act and 102.19(c) of the Board's Rules and Regulations as an affirmative defense.

My original decision rejected those affirmative defenses and concluded that the General Counsel was justified in reinstating the charges more than six months after the closing and reopening of the plant even without a formal motion for reconsideration pursuant to Section 102.19(c). See 288 NLRB at 1380-1383. At that time, my conclusion was supported by *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), which held that the General Counsel had virtually unlimited discretion under Section 3(d) of the Act to reinstate a previously dismissed charge even outside the 6-month limitation period in Section 10(b) absent a showing that the General Counsel abused his discretion. In my judgment, no abuse had been shown.

Respondents filed timely exceptions in which they asserted, inter alia, that my decision concerning their time-bar affirmative defenses was erroneous.

On 11 January 1985, the Board issued its decision in *Ducane Heating Corporation*, 273 NLRB 1389 (1985) holding that:

> [A] dismissed charge may not be reinstated outside the six-month limitation period of Section 10(b) absent

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[1] For separate references to Respondents, O'Neill includes collectively Edwin R. O'Neill, an Individual, O'Neill Ltd., Food Equipment Leasing Company, and Amalgamated Meat Co. f/k/a O'Neill Meat Company. The following acronyms are used for remaining Respondents: FBP—Fresno Beef Processors, Inc.; DTC—Don Turner Corporation; SPM—Sierra Pacific Meat Co.; and JET—J & E Transport, Inc. The Charging Parties are referred to separately by their local numerical designations and jointly as the Locals.

> special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitation period begins to run from the time the charging party knows or should have known the concealed facts.

In so holding, the Board specifically overruled *California Pacific Signs* to the extent that it was inconsistent.

Subsequently, on 25 March 1985, the Board issued a Notice to Show Cause in this matter why—in view of its *Ducane* decision—it should not dismiss this complaint in its entirety. Timely responses were filed that led to the instant remand.

In its 1 August 1985 remand order, the Board specifically noted argument by the General Counsel and the Charging Parties that I had denied them an opportunity to present evidence "on the Respondent's alleged fraudulent concealment of the operative facts establishing the violations because [I] was satisfied that under existing law the charge was not time barred by Section 10(b) of the Act." For this reason, they argued that the case should be remanded "so that evidence may be presented on this issue."Accordingly, the 1 August remand order provided "that in light of *Ducane Heating,*" I should "take whatever appropriate action that is necessary to resolve [the Sec. 10(b)] issues including reopening the hearing for the taking of additional evidence" and, thereafter, issue an appropriate supplemental decision. On 19 September 1985 the Respondents filed a motion requesting reconsideration of the Board's remand order, which the Board denied on 31 October 1985.

In the meantime, on 21 August 1985, I issued an order to Show Cause—returnable 12 September 1985—why the hearing should be reopened. At the General Counsel's request, the time for answering my order to show cause was extended to 20 September 1985. O'Neill's request that the

order be held in abeyance, pending the Board's ruling on O'Neill's planned motion for reconsideration of the Board's 1 August remand order, was denied on 5 September 1985 pursuant to Section 102.48(d)(3) of the Board's Rules and Regulations. The General Counsel, Local 126, and O'Neill then filed timely responses. DTC and JET each filed general responses adopting "any moving papers, responses, or other pleadings" filed by any of the other Respondents.

The General Counsel's response asserted that the existing record was adequate to support a finding of "fraudulent concealment" within the meaning of *Ducane Heating*, but asked that the hearing be reopened to supplement the record with evidence of "the specific circumstances which resulted in the General Counsel's reinstitution of the underlying unfair labor practice charges in November 1978."

Local 126 also argued that the record was sufficient to support a *Ducane Heating* "fraudulent concealment" finding. Local 126, however, argued that if it were permitted to pierce the attorney-client privilege asserted in the original proceeding, it would further prove that particular attorneys representing O'Neill "were well aware of the facts underlying the fraud . . . [and were] part of the fraudulent scheme". Notwithstanding, Local 126 stated that it was "arguably unnecessary" to adduce such additional evidence and urged the issuance of a supplemental decision "quickly" without reopening the record.

O'Neill asserted only that no action should be taken as its motion for reconsideration of the Board's 1 August remand was then pending and that further proceedings should be stayed until the Board ruled on its motion for reconsideration. DTC and JET were deemed to have joined in O'Neill's position.

Having rejected O'Neill's earlier request to stay proceedings pending the Board's ruling on its motion for reconsideration on 5 September, and having considered the remaining responses, notice was given on 9 October 1985

that the hearing would be reopened for the limited purpose of supplementing the record concerning the events following the dismissal of the charges which led to the reinstitution of the charges by the General Counsel. In sum, only the General Counsel had stated a desire to proffer additional evidence.

Thereafter, the reopening of the hearing was twice postponed based on representations made administratively that the parties were engaged in negotiations looking toward the execution of a stipulation encompassing those matters which the General Counsel intended to offer at the reopened hearing. By letter dated 29 November 1985, the General Counsel transmitted that stipulation executed by all relevant parties. Among other things, the stipulation requested that I issue an order "closing the hearing and set a date for the submission of briefs . . . with respect to those issues raised by the Board's 1 August 1985 order. . . ."[2]

On 17 December 1985, I issued an order withdrawing the notice of hearing and setting a date for the filing of briefs. The General Counsel, Local 126, O'Neill, and JET each filed timely briefs. DTC filed a brief adopting, in essence, the O'Neill and JET briefs.

B. *The Original Charges And Their Disposition*

The charge in Case 32—CA—848 was filed by Local 126 on 12 April 1978. It alleged that "O'Neill Meat Co. and/

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[2] The stipulation was executed by all parties except FBP and SPM. It further provided that I issue an order to show cause why the facts recited therein should not be deemed true regarding those Respondents who did not execute the stipulation. Having previously found FBP and SPM were alter egos of O'Neill and that reconsideration of that finding was not within the scope of the remand, I deemed FBP and SPM bound by O'Neill's stipulation. That stipulation is approved and it, along with all orders, rulings, and responses (listed in Appendix A), are hereby made a part of the record.

or O'Neill Ltd. and/or Food Equipment Leasing Co." violated Section 8(a)(1), (3) and (5) of the Act in the previous six months by changing "the name and style of which business was conducted in order to avoid the negotiated agreement [with Local 126]" and "engaged in the series of devices or subterfuges to claim separate entity status in order to avoid the [Local 126] agreement." The charge in Case 32-CA—928—alleging similar conduct regarding Local 431—was filed by Local 431 on 11 May 1978. There is no claim by any party that, as originally filed, either charge was untimely regarding the plant closing on 18 November 1977 and its reopening on 12 December 1977 insofar as the O'Neill corporate Respondents are concerned.

Following an investigation, the Regional Director for Region 32 dismissed both charges by separate letters dated 28 June 1978. The pertinent portion of the practically identical dismissal letters is quoted in my original decision. *O'Neill, Ltd.*, 288 NLRB at 1380 (1988).

Local 126 timely appealed the dismissal in Case 32-CA-848 to the General Counsel. On 24 August 1978 the General Counsel sustained the dismissal of Case 32-CA-848. Local 431 never appealed the dismissal of 32-CA-928.

C. *The Post-Dismissal Events*[3]

By letter dated 5 October 1978, Victor Van Bourg, Local 126 counsel, submitted five statements to the Regional Director for Region 32 in support of reopening Case 32-CA-848 "preserving both its number and filing date." In that letter Van Bourg argued that the statements demonstrated that Respondents had not been "candid" during the investigation and that the statements supported the

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[3] In the main, the events described below are based on the parties' stipulation submitted by the General Counsel's 28 November 1985 letter.

allegations of Local 126's charge. The statements were those of Edward J. Jansen and Douglas Ladd, former supervisors or officials of Respondents; Lynn White and James Whiting, Local 126 officials; and Tom Diamond, a salesman for Midwest Meat Co. f/k/a Kerman Wholesale Meat Co., a longtime customer of the Respondents.

In his eight-page handwritten statement dated 5 October 1978, Jansen described pre-closing remarks by Edwin O'Neill and his labor relations consultant, Lee Brewer, about a plan to get rid of the Union; assurances he received from O'Neill officials of future employment as the plant closing approached; assignments he was given in the interim period before the plant reopened by O'Neill officials'; instructions by Edwin O'Neill to supervisory personnel concerning operational details after the plant reopened without regard for their ostensible employers; and the involvement of officials and employees of O'Neill companies in the preparation and operation of the plant after it reopened.

Ladd, a vice president and sales manager for O'Neill Meat Co. for a number of years, provided a nine-page typed statement dated 22 September 1978. He recounted 1976 remarks by Edwin O'Neill about getting rid of the union; outlined the involvement of O'Neill officials to establish SPM, in which he was made the secretary-treasurer; described the complete lack of involvement by Eric Garrett--ostensibly the owner of SPM—in the management of SPM; described the preparation of sham corporate papers for SPM; described several meetings involving supervisors and officials of SPM, DTC, FBP, and JET after the plant reopened, during which Edwin O'Neill gave detailed operating instructions about the plant; described O'Neill's control of the finances of the resumed operation and his own lack of control over SPM's financial records; described SPM's lack of capital and credit; and asserted that "Ed O'Neill has continued to run the whole show."

Lynn White's statement described a conversation related to him by DTC supervisor Ron Cox wherein Edwin O'Neill convinced Cox not to quit his job at the reopened plant.

Tom Diamond's six-page handwritten statement of 21 September 1978 recounted an incident he witnessed with Edwin O'Neill in August 1978. As described by Diamond, Edwin O'Neill came to Midwest demanding collateral for accounts receivable owed to SPM. Although accompanied by Lawrence Boragno, an SPM official, Edwin O'Neill did all of the talking. Midwest's owner, Fred Pallesi, eventually agreed to the collateral demand and executed the papers tendered by Edwin O'Neill after receiving Edwin O'Neill's personal guarantee that the collateral would be returned when Midwest's bill was paid. Diamond also asserted that in the dealings between Midwest and the reopened operation, Edwin O'Neill always held himself out as the executive in charge of SPM, among others. Finally, Diamond asserted that on another occasion Edwin O'Neill stated that he would someday disclose to Diamond the "slick way" he got out from under the union contract by setting up new paper entities.

White's statement—which is unsigned—essentially relates hearsay information concerning the August 1978 incident described by Diamond.

The information provided by Diamond, Jansen and Ladd was an embryo at odds with the stated conclusion in the Regional Director's dismissal—and the General Counsel's subsequent concurrence—that there was "no evidence that Ed O'Neill . . . has any ownership in . . . [nor] maintains any control of [FBP, DTC, SPM or JET]."

Shortly thereafter, the Regional Office transmitted Van Bourg's information to the General Counsel. By letter dated 6 November 1978, the General Counsel notified Van Bourg—with a copy to O'Neill's attorney—that his letter of 5 October 1978 and the "newly discovered" evidence submitted therewith, was being treated as a motion for

reconsideration and that all parties would be notified of his future decision.

By letter dated 15 November 1978, the General Counsel notified Local 126 and O'Neill that "newly discovered evidence", not previously available prior to the 24 August 1978 decision denying the appeal in Case 32-CA-848, had been received. Without elaborating on the nature of the newly discovered evidence, the General Counsel revoked his decision of 24 August and remanded the case to the Regional Director for further processing.

By letter dated 21 November 1978, the Regional Director notified all parties that he was rescinding the 28 June 1978 dismissal letter and was reinstituting the charge for further processing on the basis of newly discovered evidence.

Following the reinstatement of Case 32-CA-848, Local 126 amended the charge on 3 January 1979 to list additional respondents, namely, SPM, FBP, DTC, and JET. This was the first occasion that these four entities were named in any charge. On 22 January 1979, Local 126 again amended Case 32-CA-848 to allege Edwin R. O'Neill as a respondent in his individual capacity and deleting JET as a respondent.[4]

In the meantime, Local 431 requested, by a letter dated 15 January 1979, that the Regional Director rescind the dismissal of Case 32-CA-928. That request was granted on 18 January 1979. On 8 February 1979, Local 431 amended its reinstated charge to allege Edwin R. O'Neill as a respondent in his individual capacity and to add JET and DTC as respondents.

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[4] As found in my original decision, it is reasonable to infer that Local 126 deleted JET from its charge because JET never performed functions that required it to employ individuals in work categories previously represented by Local 126. O'Neill, Ltd., supra at 1380 fn. 44.

As a result of the foregoing, the Regional Director issued a complaint in 32-CA-848 on 30 January 1979 alleging that Edwin R. O'Neill, an individual, O'Neill Ltd., FELC, Amalgamated Meat Company, f/k/a OMC, FBP, DTC, and SPM had violated Section 8(a)(1) and (5) of the Act. Later, on 27 April 1979, the Regional Director issued an order consolidating Case 32-CA-848 with 32-CA-928. In terms of the named parties, Local 431 was added to the proceedings as a charging party in Case 32-CA-928 and JET was added to the list of Respondents in the consolidated complaint which alleged numerous violations of Section 8(a)(1), (3) and (5) of the Act.

The Respondents timely filed answers denying the alleged unfair labor practices and alleging affirmatively that the Board was precluded by Section 10(b) of the Act and its own rules and regulations from pursuing this matter.

D. *Contentions*

The General Counsel asserts that the statements of Ladd and Jansen provided both Local 126 and the General Counsel with "the first tangible piece of evidence as to what had actually occurred and what the relationship was between [O'Neill, and SPM, FBP, DTC and JET]."

The General Counsel vigorously argues that the complaint should not be dismissed on the Ducane rationale. He argues first that *Ducane* should not be applied retroactively in this case because of the peculiar and egregious circumstances present. Second, the General Counsel believes Respondent fraudulently concealed operative facts and, accordingly, this case fits the exception in the *Ducane* case. Alternatively, the General Counsel contends that even if there was no fraudulent concealment, the charges here were, in fact, reinstituted within the 10(b) period because the existing collective bargaining agreements between O'Neill and the Locals had not expired. In this circumstance, the General Counsel asserts that because O'Neill

abrogated the existing collective-bargaining agreements, there was a continuing violation for which the 10(b) limitation period had not expired.

Local 126 also argues that *Ducane* should not be applied retroactively, albeit for reasons other than those advanced by the General Counsel. In any event, Local 126 claims this case fits the *Ducane* fraudulent concealment exception.

O'Neill argues on the following grounds that the complaint should be dismissed on the basis of *Ducane*. First, neither of the Charging Parties met the burden of Section 102.19(c) of the Board's Rules and Regulations by: 1) filing a motion for reconsideration promptly; 2) proving that there was "newly discovered evidence" within the meaning of Section 102.19(c); or 3) showing that any alleged newly discovered evidence was not discoverable by diligent inquiry prior to the General Counsel's decision on appeal. O'Neill also notes that Local 431 never appealed the Regional Director's decision; hence no basis ever existed for reinstituting the Local 431 charge. Second, the Charging Parties are precluded by Section 102.46(h) of the Board's Rules and Regulations from now asserting fraudulent concealment because that matter was not previously raised in any exception or cross-exception. Third, the complaint contained no fraudulent concealment allegation and hence it is inappropriate to consider testimony or evidence or to make findings on that subject at this time. Fourth, the *Ducane* rule requires that this case be promptly dismissed as the charges were indisputably reinstated outside the 10(b) period and there is no evidence of fraudulent concealment as everyone knew of the existence of SPM, FBP, DTC and JET. Fifth, the General Counsel's retroactivity argument lacks merit.

In addition to adopting the arguments made by O'Neill, JET argues separately that because it employed only truck drivers when the plant reopened in December 1977, Local 431 was the only labor organization which had standing

to file a charge against JET. Furthermore, JET asserts that Local 431's charge was untimely without regard to the Ducane issue. JET also argues that the charge in 32-CA-848 (filed by Local 126) cannot be utilized to support the complaint which eventually issued against JET.[5]

Everyone recognizes that Section 10(b) of the Act is a statute of limitation which bars the prosecution of a complaint based on a charge filed with the Board more than six months following the conduct alleged to constitute the unfair labor practice.

If a charge is filed after the six-month period, however, the General Counsel may still prosecute a complaint if the respondent has fraudulently concealed its unlawful conduct. See *Burgess Construction*, 227 NLRB 765, 766 (1977), enf'd 596 F.2d 378, (9th Cir. 1979), cert. denied, 444 U.S. 940 (1979). As the Board observed in *Burgess*, the tolling principle based on fraudulent concealment—so far as Section 10(b) is concerned—has its roots specifically in Machinists Local 1424 (*Bryan Mfg. Co. v. NLRB*), 362 U.S. 411 (1960). In that case, the Supreme Court called attention, at footnote 19, to the fact that the Section 10(b) limitation period did not apply in situations involving fraudulent concealment of unlawful conduct.[6]

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[5] At the original hearing, JET made arguments which are fundamentally the same as those noted. Because I found JET was an alter ego of the O'Neill Respondents, I rejected those arguments then and adhere to those conclusions now. Entirely aside from that rationale, I further find that JET's efforts to renew those claims are beyond the scope of the remand. Hence, they will not be addressed further in this decision.

[6] It is also noteworthy that a party who obtains a final judgment by perpetrating a "fraud upon the court" should not expect the benefits of finality. *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238 (1944); *Toscano v. C.I.R.*, 441 F.2d 930 (9th Cir. 1971). And see FRCP 60(b). Because the General Counsel has unreviewable authority to refuse to issue complaints in unfair labor practice cases—as originally occurred here—and thereby can preclude parties from even having a day in court,

As noted when these cases were reinstated, the General Counsel had "virtually unlimited" discretion to reopen dismissed charges provided they were timely filed originally. *California Pacific Signs*, 233 NLRB 450 (1977). As the charges here were timely filed regarding the closing and reopening of the meat plant, no need existed to examine whether the 10(b) period may have commenced at some other time. *Ducane* changed that governing principle. The Board held in *Ducane* that the General Counsel cannot reinstitute even timely filed charges outside the 10(b) period absent evidence of fraudulent concealment of "operative facts," and where there is fraudulent concealment, the Board held "the limitations period begins to run when the charging party knows or should have known of the concealed facts."

In *Ducane*, the Board did not elaborate on the basis for the fraudulent concealment exception or the precise set of circumstances which would exist in the event fraudulent concealment was shown. However, in another portion of the *Ducane* case, the Board held that the General Counsel had discretion "to accept reconsideration motions submitted *within the 10(b) time limit*, but beyond the 10-day period provided by Section 102.19(c) itself or any extension given by the General Counsel." (Emphasis mine.) The Board continued by saying that the "General Counsel need only act within the 10(b) period" to merely accept an untimely motion for reconsideration.

The Supreme Court has long held that the fraudulent concealment of facts essential to the cause of action serves to toll the limitations period and that this equitable doctrine is read into *every* federal statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 393, 397 (1946). The historical roots of this fraudulent concealment doctrine and its re-

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a compelling argument could be made that a respondent who fraudulently procures the dismissal of a charge is committing a "fraud upon the court."

finements over the years were recently reviewed in *Hobson v. Wilson*, 737 F.2d 1, 33 (D.C. Cir. 1984). Judge Edwards' discussion in *Hobson* at pages 33-36 is worthy of lengthy quotation here:

> The keystone of federal fraudulent concealment doctrine is *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 33 L.Ed. 636 (1874), in which the Court wrote that where a party injured by another's fraudulent conduct remains in ignorance . . . without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. 88 U.S. (21 Wall.) at 348. The Court also held that, absent laches or negligence on plaintiff's part, the limitations period does not begin to run until plaintiff discovers his cause of action when "the fraud has been concealed *or is of such character as to conceal itself.*" *Id.* 88 U.S. (21 Wall) at 349-50 (emphasis added). Shortly thereafter, in *Wood v. Carpenters*, 101 U.S. 135, 25 L.Ed. 807 (1879), the Court gave some indication of the meaning of the phrase "of such character as to conceal itself," when it wrote, "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Id.* 101 U.S. at 143. Read together, *Wood* and *Bailey* establish first, that equitable tolling generally has two elements, (successful) concealment by defendant and diligence by plaintiff, and second, that a defendant who contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and who misleads plaintiff in the course of committing the wrong, may be found to have concealed the wrong. This second principle distinguishes between acts that are self-concealing (such as frauds) and acts where, absent a subsequent act of concealment, only the perpe-

trator, but not the fact that a cause of action might exist, would be unknown (such as a burglary). In the former case, concealment is established by the nature of the act; in the latter case, additional acts of concealment are required to trigger the tolling doctrine.

Although the foregoing principles generally have been accepted by the courts, the case law reflects a variety of formulations to apply the concealment doctrine. In each instance, however, before a defendant's "exposure to liability is given a potentially infinite duration, there [is] some minimum of culpability—if not affirmative concealment, then at least the construction of a scheme which is by its nature unknowable."

. . . Bearing in mind *Wood's* requirement of "some trick or contrivance intended to exclude suspicion," 101 U.S. at 143, we conclude that defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*, that is designed to mask the existence of a cause of action. The deception may be as simple as a single lie or as complex as that which we confront here, so long as the defendants conceal "not only their involvement, but the very conduct itself." *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981).

This Circuit has recently refined its approach to cases involving *self-concealing wrongs* and placed on the defendant the burden of proving that the plaintiff did not exercise due diligence. Thus, in *Richards v. Mileski*, the court held "[w]hen tolling is proper because the defendants have concealed the very cause of action, . . . they have the burden of coming forward with any facts showing that the plaintiff could have discovered . . . the cause of action if he had exercised due diligence." 662 F.2d at 71. . . . .

Before turning to apply these principles to defendants' principal assertions about the sufficiency of the evidence on fraudulent concealment, we pause to note an obvious,

albeit often overlooked, proposition. The doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim. . . . By "notice," we refer to an awareness of sufficient facts to identify a particular cause of action, be it a tort, a constitutional violation or a claim of fraud. We do not mean the kind of notice—based on hints, suspicions, hunches or rumors—that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit.

In sum, the federal doctrine of fraudulent concealment serves to postpone the start of the period of limitation until evidence of a cause of action is discovered or should have been discovered with the exercise of reasonable diligence. Once facts essential to establishing a cause of action are known or should be known, the limitation period begins to run even though it may be long after the injury has occurred. This is best illustrated by the *Richards* case referred to by Judge Edwards. There, the plaintiff discovered the facts essential to his tort claim nearly 23 years after they occurred. The limitation period for some of the torts Richards alleged was one year. Richards' action was commenced 11 months and 25 days after he discovered the critical facts—or nearly 24 years after they occurred. His action was held to be timely as the limitation period only commenced when he discovered the essential facts—or after 23 years.

The *Burgess* case presents an analogous—albeit much less extreme—set of circumstances. There the Board and the Ninth Circuit held that the filing of an unfair labor practice, just short of 6 months after the charging union discovered previously concealed pertinent facts, was timely filed regarding the 6-month limitation period in Section 10(b) of the Act even though the unfair labor practice originally occurred 10 or more months before the charge was filed.

E. *Concluding Findings*

In my original decision, I concluded "that SPM, FBP, DTC, and JET constitute the alter ego of [O'Neill Meat Company] OMC [a/k/a Amalgamated Meat Company] and, further, that those four entities together with O'Neill Ltd. and FELC constitute the alter ego of the entities that operated the meat plant prior to November 18, 1977." *O'Neill, Ltd.*, supra at 1378. In my judgment, the evidence warranted the finding "that the owners of the new entities were nothing more than fronts for [Edwin] O'Neill." Id. at 1379. I further found that the object of this corporate scheming "was designed primarily to avoid the existing labor agreements and the obligation to deal with the designated employee representatives" and that "any actions against the employees. . . [were] motivated by a discriminatory purpose." Id. at 1383. Moreover, I found that Edwin O'Neill "personally was the dominant figure in the plan of evasion [represented by the post-November 1978 operation of the plant with *alter ego* entities]. . ." Id. at 1384. In addition to the foregoing conclusions concerning the true nature of the post-November 1977 operation, I also concluded that the December 1977-March 1978 effects bargaining was "conducted in bad faith for the purpose of creating the illusion that [Edwin] O'Neill was terminating his meat processing operations." Id. at 1366.

By definition, an alter ego is the "disguised continuance" of an older employer involving "a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974). Although it can be forcefully argued that every alter ego is tantamount to fraudulent concealment, it is certainly safe to say that every employer who dabbles in the alter ego game treads at the very edge of the fraudulent concealment abyss.

I now conclude that Edwin O'Neill's scheme of closing the meat plant and resuming its operation utilizing FBP, DTC, SPM, and JET as fronts for his dominant involvement in the continuation of this meat processing operation, when coupled with the misrepresentations concerning the nature of the resumed operation during the effects bargaining—all for the object of evading a lawful contract obligation with the employee bargaining representatives and the duty to bargain under the Act—constituted a fraudulent plot of the self-concealing variety within the meaning of Federal law concerning the tolling of statutes of limitation. *Holmberg v. Armbrecht,* supra; *Hobson v. Wilson,* supra; *NLRB v. Burgess Construction,* supra. For this reason, I find that the 10(b) period was tolled until the Locals acquired evidence of the plot or, put another way, the 10(b) period did not commence with the closing and the reopening of the plant in 1977. To hold otherwise would credit O'Neill, the wrongdoer, with the benefit of his elaborate shield and would ignore his attempts during effects bargaining to convince the Locals that he was no longer in the meat processing business.

Having concluded that Edwin O'Neill and his business associates fraudulently concealed the true nature of the 1977 closing and reopening of the plant sufficient to toll the 10(b) period, the next step is to identify as precisely as possible the date when the 10(b) period began to run. The two most obvious dates are: 1) 12 April 1978, when Local 126 filed its original charge alleging, in effect, that the new operation was the alter ego of the old;[7] or 2) in late September 1978, when Diamond and Ladd provided evidence that O'Neill was personally conducting the affairs of SPM, the financial keystone of the resumed operation.

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[7] Local 431 may appropriately by charged with knowledge equivalent to Local 126 at various times. It is evident, however, that Local 126 took the lead throughout in pursuing legal claims against O'Neill.

By the filing of the charge on 12 April 1978, Local 126 certainly indicated that it had ceased to rely on the surface appearance that new and independent firms were operating the plant and Edwin O'Neill's claims that he and his companies were no longer in the meat processing business. The fact that Local 126 ceased believing O'Neill's assurances, however, is not sufficient to support a finding that the elaborate coverup had been exposed or that the Locals had based their charges on anything beyond suspicion and conjecture. *Hobson v. Wilson*, supra. Indeed, the Regional Director's conclusion, following the investigation of the charges, suggests that the scope of the concealment had not only continued, it had been extended to concealing Edwin O'Neill's true role from the General Counsel. Where, as here, the clear object of the elaborate alter ego scheme was to avoid the effect of Federal labor laws, I perceive no valid policy that is served by according it any finality simply because the Locals filed premature charges. For these reasons, it is my conclusion that the 10(b) period remained tolled even though Local 126 and 431 filed unfair labor practice charges based on unsupported conjecture that Edwin O'Neill was still engaged in the meat processing business.

On the other hand, the fact that the Locals filed the charges merits the conclusion that they were diligently engaged in an effort to uncover the true nature of the plant closing and resumption. The record in this case makes one thing evident above all else, the Locals faced a very formidable task in cutting through O'Neill's elaborately concealed involvement to learn the true facts. Because the forum procedures provided no basis for compulsory process, the Locals were essentially left with supporting their charge with volunteered information.

Obviously, the arrest of Ladd and Jansen provided Local 126 with the fortuitous circumstance of individuals who were willing to talk and who had participated on the inside of the O'Neill-controlled operation. As that information be-

gan coming forward on 21 September 1978 in the form of Diamond's statement and continued over the next 2 1/2 weeks with more detailed and significant statements by Ladd and Jansen, I find that date to be the earliest occasion on which "operative facts" in this case were disclosed, i.e., Edwin O'Neill's actual control and economic dominance of the resumed operation. This evidence—from all that is known—was the first to expose the alter ego fraud which was ongoing. Accordingly, I find that the Locals were obliged from that point forward by Section 10(b) of the Act to pursue their claims in a timely fashion. In short, the tolling of the limitation period had ceased and the Act's six-month period of limitation began to run.

Having concluded under the Federal fraudulent concealment doctrine that the 10(b) period did not commence until 21 September 1978, it follows that all action taken to reinstate the charges here occurred within the 10(b) period. In this circumstance, the Board's holding in *Ducane,* relating to the Robinson charge, applies. See *Ducane Heating,* supra. Contrary to Respondent's contentions concerning the Board's failure to follow its rules, that holding provides that the General Counsel has discretion to entertain a motion for reconsideration beyond the 10-day period specified in Section 102.19(c) of the Board's Rules and Regulations. Accordingly, because there is no evidence that the General Counsel acted arbitrarily or capriciously, or abused his discretion in treating Van Bourg's 5 October 1978 letter and Bodine's 15 January 1979 letter as motions for reconsideration and thereafter granting those motions, I find Respondents' claims that the Board failed to follow its own rules to be without merit. Finally, I further find that the General Counsel acted to reinstate both charges within the 10(b) period and, hence, the charges are not time barred.[8]

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[8] In light of this conclusion, I find it unnecessary to address the other contentions of all parties beyond noting that they, in my judgment, lack merit.

Conclusions of Law

1. The statute of limitation in Section 10(b) of the Act commenced in this proceeding on 21 September 1978.

2. The General Counsel reinstated the charges in Case 32-CA-848 and 32-CA-928 within the 10(b) period.[9]

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. *and* United Food and Commercial Workers Union, Local 126, AFL-CIO. Case 32-CA-3462

May 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 16, 1982, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed an exception, and United Food and Commercial Workers Union, Local 126, AFL—CIO filed exceptions and a brief in support of the exceptions. Respondents Edwin R. O'Neill, O'Neill, Ltd., Amalgamated Meat Co., and Food Equipment Leasing Company (O'Neill entities) filed exceptions and a brief.[1] Respondent J & E Transport, Inc. filed exceptions and a brief.[2]

[1] The request for oral argument made by Respondents Edwin R. O'Neill O'Neill, Ltd., Food Equipment Leasing Company, and Amalgamated Meat Co. is denied, as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] As its brief in the present case, Respondent J & E Transport submitted its May 28, 1982 exceptions brief to Administrative Law Judge Schmidt's decision in the companion consolidated Cases 32-CA-848 and 32-CA-928. In the May 28 brief Respondent J & E transport took exception, inter alia, to certain of Judge Schmidt's credibility determinations. The Board in Edwin R. O'Neill, 288 NLRB No. 147, issued today, affirmed the judge's credibility determinations.

The May 28 brief also incorporated by reference the other Respondents' exceptions and supporting arguments. The Respondents alleged bias on the part of Judge Schmidt. The Board in the companion cases found Judge Schmidt's findings to be free of bias.

Respondents Don Turner Corporation, Fresno Beef Processors, Inc., and Sierra Pacific Meat Company, Inc. joined in and adopted the exceptions and briefs in support of exceptions filed by both Respondents O'Neill entities and Respondent J & E Transport. Respondents O'Neill entities joined in and adopted the exception and brief filed by J & E Transport. Respondent J & E Transport adopted the exceptions and supporting briefs filed by "the other named Respondents."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order[3] as modified.

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[2] We specifically affirm the judge's determination that Respondent Edwin O'Neill is individually liable for the unfair labor practices. See *Las Villas Procedure*, 279 NLRB 883 (1986).

In light of the specific facts of this case and the companion cases, the Respondents' bad-faith dealings with Local 126, and Judge Schmidt's finding in the companion cases that the effects bargaining between the Respondents and Local 126 on December 8, 1977, and January 19, 1978, was conducted in bad-faith, we affirm Judge Shapiro's conclusion that Local 126 was reasonable in believing that any effects bargaining between it and the Respondents in 1981 would be futile; "[u]nions need not grovel or undertake apparently futile acts." *Armour & Co.*, 280 NLRB 824 (1986). See also *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986).

[3] In his recommended remedy, Judge Shapiro imposed a limited backpay requirement similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). Judge Shapiro limited the backpay remedy to those meat plant employees actually employed by the Respondents in February 1981.

In their exceptions, the General Counsel and Local 126 request that the Board extend Judge Shapiro's backpay order to the employees in the appropriate unit who were employed at the meat plant and unlawfully discharged in November 1977, in addition to those employees who were discharged when the Respondents closed the meat plant on Feb-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc., Fresno, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2 (a), and renumber the subsequent footnote.

"(a) Pay the employees in the above-described appropriate bargaining unit (i) who were terminated on November 18, 1977, and ordered to be reinstated in Cases 32-CA-848 and 32-CA-928 and (ii) the employees in the ap-

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ruary 18, 1981. In Cases 32-CA-848 and 32-CA-928 we found that the Respondents unlawfully discharged employees in the appropriate unit in November 1977 and we have ordered that the discriminatees be reinstated. Accordingly they would have been employed by the Respondents on February 18, 1981, when the meat plant legitimately ceased operations. The backpay order should also extend to them. Accordingly, we shall modify the Order.

We find no merit in Local 126's request for litigation expenses or other extraordinary remedies. *Heck's Inc.*, 215 NLRB 765 (1974). See also *Wellman Industries*, 248 NLRB 325 (1980).

The Respondents' misconduct in the instant case and in the related cases was so egregrious and widespread as to demonstrate a general disregard for the employees' fundamental statutory rights, therefore a broad cease-and-desist order is warranted. Accordingly, we have substituted broad cease-and-desist language in place of the narrow language the judge used. See *Hickmott Foods*, 242 NLRB 1357 (1979).

propriate bargaining unit who were terminated on February 18, 1981, their normal wages for the period set forth in the remedy section of the decision, plus interest as computed in the manner described in *New Horizons for the Retarded.*[8]

"[8] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977)."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain collectively about the effects of the closure of the O'Neill meat plant with United Food and Commercial Workers Union, Local 126, AFL-CIO as the exclusive representative of all the employees in the following appropriate unit:

> All slaughterhouse and meatpacking employees employed at the O'Neil meat plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the above-named Union with respect to the effect of closing the O'Neill meat plant in Fresno, California, on the employees who were employed there in the above-described unit, and reduced to writing any agreement reached as a result of such bargaining.

WE WILL pay the employees in the appropriate bargaining unit (i) who were terminated on November 18, 1977, and ordered to be reinstated in Cases 32-CA-848, and 32-CA-928 and those (ii) who were employed at the O'Neill meat plant on February 18, 1981, their normal

wages, plus interest, for a period required by the Board's Decision and Order.

EDWIN R. O'NEILL, AN INDIVIDUAL; O'NEILL, LTD.; FOOD EQUIPMENT LEASING COMPANY; AMALGAMATED MEAT CO.; O'NEILL MEAT COMPANY; FRESNO BEEF PROCESSORS, INC.; DON TURNER CORPORATION; SIERRA PACIFIC MEAT COMPANY, INC.; AND J & E TRANSPORT, INC.

Charles A. Askin, Esq., for the General Counsel.
Howard A. Sagaser, Esq. (Thomas, Snell, Jamison, Russel, Williamson & Asperger), for Respondent J & E Transport, Inc.
George J. Tichy, II and *Michael J. Hogan (Littler, Mendelson, Fastiff & Tichy)*, for the Respondents other than J & E Transport, Inc.
David A. Rosenfeld, Esq. (Van Bourg, Allen Weinbery & Roger), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: On charges duly filed on March 10, 1981 by Butchers' Union Local No. 126, United Food and Commercial Workers, AFL-CIO, (the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint and notice of hearing dated April 23, 1981, against Respondents Edwin R. O'Neill, (Respondent O'Neill); O'Neill, Ltd., (Respondent O'Neill, Ltd.); Food Equipment Leasing Company, (Respondent FELC); Amalgamated Meat Co., (Respondent Amalgamated); Fresno Beef Processors, Inc., (Respondent Fresno Beef); Don Turner Corporation, (Respondent Turner); Sierra Pacific Meat Company, Inc., (Respondent Sierra); and, J & E Transport, Inc., (Respondent J & E). The complaint alleges that Respondents engaged in unfair labor practices affecting commerce within the meaning of Sec-

tion 8(a)(1) and (5) of the National Labor Relations Act, by not affording the Union an opportunity to bargain over the effects upon the employees represented by the Union of the closure of a meatpacking plant located in Fresno, California at 2356 South Fruit Avenue, (O'Neill Meat Plant), operated by Respondents. Copies of the charges and complaint and notice of hearing were duly served on the parties. Respondents filed answers to the complaint, admitting certain factual allegations of the complaint but denying the commission of any unfair labor practices.

Thereafter the parties entered into a stipulation of facts and jointly petitioned the Deputy Chief Administrative Law Judge to designate an Administrative Law Judge for findings of fact, conclusions of law and an order. The parties stipulated that they waived the hearing before an administrative law judge and that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the charge, complaint and the stipulation of facts constitute the entire record in this case.

On November 16, 1981 I was designated by the Deputy Chief Administrative Law Judge to prepare and issue a decision in this proceeding and on that date issued an order for the filing of briefs by the parties. Thereafter, the General Counsel and Respondents filed briefs in support of their position.

On the basis of the stipulation of facts and the exhibits attached thereto, the briefs and the entire record in this proceeding, I make the following:

Findings of Fact

I. The Board's Jurisdiction

The parties stipulated that during the 12-months preceding March 10, 1981, the date of the closure of the O'Neill Meat Plant, Respondent FELC, in the course and conduct of its business operations, sold goods and services

valued in excess of $ 50,000 to customers or business enterprises which customers or enterprises themselves met one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard. In view of this and inasmuch as Administrative Law Judge Schmidt, in Cases Nos. 32-CA-484 and 32-CA-928, as described infra, has concluded that the Respondents herein, including Respondent FELC, constitute one employer for purposes of the Act with respect to the operation of the O'Neill Meat Plant, I find that each of the Respondents is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets an applicable discretionary Board jurisdictional standard. I further find that it effectuates the policies of the Act for the Board to exercise its jurisdiction over the instant labor dispute.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Butchers' Union, Local No. 126, United Food and Commercial Workers, AFL-CIO, (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Stipulated Facts*

1. The background[1]

On November 28, 1977 the facility involved in this proceeding, the O'Neill Meat Plant, was operated by

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[1] The findings of fact in this subsection are based on the findings made by Administrative Law Judge Schmidt in his decision issued on March 30, 1982 in Cases Nos. 32-CA-848 and 32-CA-928. The proceeding in those cases involved certain issues of fact and law common to the instant case. The issues of the single employer and/or alter ego relationship of the several Respondents and their obligation to recognize and bargain with the Union as the representative of a unit of employees employed at the O'Neill Meat Plant were fully litigated before Judge

Respondents O'Neill, Ltd., FELC, and Amalgamated,[2] which enterprises constitute a single employer for purposes of the Act in connection with the operation of the O'Neill Meat Plant. In November 1977 the O'Neill Meat Plant was closed and all of its employees terminated. The slaughterhouse and meatpacking employees employed in the plant were represented by the Union and covered by a collective-bargaining agreement between the Union and Respondent Amalgamated effective until December 31, 1979. Prior to the closure, Respondent Amalgamated notified the Union of its intent to close the plant and terminate the employees. Thereafter, representatives of the Union and Amalgamated bargained about the effects of the closure upon the employees represented by the Union. These negotiations were conducted by Respondent Amalgamated in bad faith with an object of creating the illusion that Respondent O'Neill was terminating his connection with the operation of the O'Neill Meat Plant when, in fact, O'Neill's intent was to continue operating the Plant through other companies in order to escape having to comply with the terms of the Union's collective-bargaining agreement and to rid himself of the Union.

On or about December 12, 1977, the O'Neill Meat Plant reopened under the operation of Respondents Sierra, Fresno Beef, Turner and J & E who are the alter egos of the former operators of the plant, Respondents O'Neill, Ltd., FELC, and Amalgamated. All of the Respondents constitute one employer for purposes of the Act with respect to the operation of the O'Neill Meat Plant.

Schmidt. The parties stipulated that with respect to the aforesaid "issues the record developed by the parties in Cases 32-CA-848 and 32-CA-928, and the legal conclusions based on that record by Judge Schmidt, as modified by the Board . . . or by any appellate court, shall be binding upon all parties in this case. . . ."

[2] Respondent Amalgamated was formerly known as the O'Neill Meat Company.

On reopening the plant in December 1977 the Respondents reemployed only 40 percent of the employees who had been employed in the plant prior to the closing and who were represented by the Union. Respondents also refused to recognize and bargain with the Union as the slaughterhouse and meatpacking employees' collective-bargaining representative, repudiated the Union's collective-bargaining agreement covering these employees, and unilaterally changed their terms and conditions of employment without bargaining with the Union.

Respondents, as found by Administrative Law Judge Schmidt in Cases 32-CA-848 and 32-CA-928, closed the O'Neill Meat Plant in November 1977 and terminated the employees represented by the Union and refused to reemploy 60 percent of these employees when the plant reopened in December 1977 in order to avoid having to recognize and bargain with the Union or comply with the Union's collective-bargaining agreement covering these employees, thereby violating Section 8(a) (3) and (1) of the Act. Judge Schmidt further found that when Respondents reopened the plant in December 1977 they violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union, by repudiating the collective-bargaining agreement with the Union covering the slaughterhouse and meatpacking employees, and by unilaterally changing the terms and conditions of employment of these employees without bargaining with the Union.

2. The events surrounding the February 18, 1981 closure of the O'Neill Meat Plant

On December 26, 1979, Victor J. Van Bourg, an attorney for the Union, wrote George J. Tichy, II, an attorney for Respondent Amalgamated, as follows:

> In 1977 when you were negotiating the alleged shutdown of the O'Neill Meat Company facility, you purported to give notification that O'Neill Meat Company

intended to terminate the contract with Local 126, effective December 31, 1979.

In light of the fact that O'Neill Meat Company continues to exist as a joint employer and/or alter-ego with the various respondents named in unfair labor practice cases 32-CA-848 and 32-CA-928, Local 126 does not desire to terminate the collective bargaining agreement, but rather to negotiate a successor agreement with O'Neill Meat Company and the various entities mentioned above.

Please remember your client's obligation under Section 8(d) of the National Labor Relations Act not to make any changes in terms and conditions of employment except in compliance with the law.

Please advise us when you will be available to begin such negotiations.

We are sending copies of this letter to the various attorneys who have entered appearances on behalf of these other entities, all of which are controlled by Mr. O'Neill.

By letter dated January 9, 1980, Attorney Tichy replied to Attorney Van Bourg, as follows:

You correctly note that O'Neill Meat Company terminated its prior collective bargaining agreement with Butchers Local 126. As you are aware, O'Neill Meat Company, presently known as Amalgamated Meat Company, was forced to go out of business because of economic reasons on November 17, 1977. Since that time the Company has been without employees in an appropriate bargaining unit covered by the now terminated collective bargaining agreement.

I want to state clearly and unequivocally that Amalgamated Meat Company is not involved in any joint employer or alter ego relationship with any

> Respondent named in unfair labor practices cases Nos. 32-CA-848 and 32-CA-928. Frankly, although I can appreciate your desire for Local 126 to have a collective bargaining agreement covering someone, there is no agreement in effect and no bargaining unit of Amalgamated Meat Company which could be covered by a bargaining relationship with Local 126.
>
> Despite the above facts, we have been authorized by Amalgamated Meat Company to bargain with representatives of Local 126 with the object of reaching an agreement to cover a bargaining unit if one should come into existence. Please contact me so that a mutually agreeable time and place may be arranged for this purpose.
>
> Although there does not appear to be a legal basis requiring bargaining between Amalgamated Meat Company and Local 126, Amalgamated Meat Company continues to approach its dealings with Local 126 in the spirit of good faith and cooperation.

The Union did not answer this letter.

On February 18, 1981 the O'Neill Meat Plant ceased operation and all of the employed at that facility, including the slaughterhouse and meat packing employees, were discharged.

On February 19, 1981, during the course of a meeting about matters not relevant to the instant case, Michael Hogan, an attorney for Respondents O'Neill, O'Neill, Ltd., and Amalgamated, asked Marcello Salcido, the Union's executive secretary-treasurer, "whether [Salcido] wished to negotiate concerning the effects of the closure of the slaughterhouse facility." Salcido replied, "He did not wish to discuss it at that time, but that he would make some contact with Hogan at some future time." Respondents had previously not afforded the Union an opportunity to

negotiate about the effects of the closure. Salcido did not contact Hogan about this matter.

On February 24, 1981 Salcido, on behalf of the Union, wrote identical letters to Respondents O'Neill Ltd., O'Neill, Amalgamated and Turner which read as follows:

> [The Union] would like to meet with you to discuss the decision to close your slaughterhouse and the effects upon the employees. We ask that you return to the status quo until the negotiations are complete. Your decision to close came as a complete surprise without opportunity for any bargaining.
>
> Please advise as to what dates you can be available to meet.

Respondent Turner responded by letter dated March 4, 1981 from its attorney, William A. Quinlan, which in pertinent part stated that Respondent Turner had no contractual or collective-bargaining relationship with the Union and was under no duty to engage in collective bargaining with the Union. Respondents O'Neill, O'Neill, Ltd. and Amalgamated responded by letter dated March 12, 1981, from their attorney, George A. Tichy, II, which read as follows:

> Your letters of February 24, 1981, addressed to Edwin R. O'Neill: O'Neill Meat Company, and O'Neill, Ltd. have been referred to me for response. As you are aware, neither Mr. O'Neill nor any company or organization with which he is associated with has any bargaining relationship with Local No. 126. Furthermore, none of these entities employ employees who are represented by your union. Under the circumstances, there is no proper basis upon which your union can claim a right to engage in negotiations with Mr. O'Neill or any entity with which he is associated.
>
> However, without waiving any position which Mr. O'Neill or any O'Neill entity has maintained concern-

ing the absence of a bargaining relationship with your union, a representative of Mr. O'Neill and the companies is willing to meet with you.

Please contact me if you wish to meet. Of course, it is understood that neither Mr. O'Neill nor any company with which he is or has been associated will by attending this meeting waive any legal position which they have advanced in NLRB Case Nos. 32-CA-848 and 32-CA-928.

On March 16, 1981 Attorney Tichy spoke to Union Representative Salcido and "mentioned to Salcido that he [Tichy] had sent a letter to [Salcido] in reply to Salcido's letter of February 24, 1981" and asked Salcido "when they could meet for negotiations." Salcido answered that "he would have to refer that question to his attorneys."

Following the aforesaid March 16 conversation between Tichy and Salcido no representative of the Union contacted any representative of the Respondents in writing or in person for the purpose of entering into negotiations about the effects upon the employees represented by the Union of the February 18, 1981 closure of the O'Neill Meat Plant. The Union refused to accept Respondents' invitation to bargain about the effects of the Plant closure because in the Union's view such a request would be futile in light of the terms set forth in the aforesaid letters of Respondents dated March 4 and March 12, 1981.

B. *Discussion and Conclusionary Findings*

An employer whose employees are represented by a labor organization is obliged by Section 8(a) (5) of the Act to bargain with that union about the effects on the employees of the employer's decision to close its business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). In the instant case, as found by Judge Schmidt in Cases Nos. 32-CA-848 and 32-CA-928, Respondents op-

erated the O'Neiil Meat Plant as a single employer and because of this each Respondent was obligated to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Plant's slaughterhouse and meatpacking employees. Accordingly, Respondents had a duty to bargain with the Union about the effects on these employees of the February 18, 1981 closure of the O'Neill Meat Plant. Respondents take the position that even if the Board and a court of appeals affirms Judge Schmidt's decision in this respect, that Respondents met their obligation to bargain with the Union about the effects of the closure by virtue of the fact that subsequent to the closure Respondents invited the Union to bargain about the effects of the closure and the Union rejected this offer. General Counsel takes the position that Respondents' invitation to the Union to bargain about the effects of the closure was untimely because it was made only after the Plant had been closed and the employees terminated.

In general, when an employer decides to take action which significantly impacts upon employees' terms or conditions or tenure of employment, the employer must afford the union an opportunity to bargain in advance of the actual implementation of the employer's decision. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962) ("unilateral action by an employer without *prior* discussion with the union [amounts] to a refusal to negotiate . . . . [emphasis supplied]"); *Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 557 (1st Cir. 1972) ("A company must give prior notice to the employees' representatives of any managerial decision which will have an impact on employment security and conditions so that the union will have an opportunity *before the change takes place* to negotiate concerning how the employees are to be protected [emphasis supplied]"); *Ladies' Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) ("notice to be effective must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining"). Consist-

ent with this principle, in cases dealing with the duty of an employer to bargin with a union about the effects on employees of the employer's decision to close its business, the Board has found a violation of Section 8(a)(5) of the Act even though the employer, after the plant has been closed and the employees terminated, invites the union to bargain over the effects of the closure. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *Thompson Transport Co.*, 184 NLRB 38 (1970); *National Terminal Baking Corp.*, 190 NLRB 465, 466 (1971). As the Board stated in *Stone & Thomas*,[3] "meaningful bargaining over effects can only occur prior to the employer's making and acting upon its decision." Likewise in discussing an employer's obligation under Section 8(a)(5) to bargain over the effects on employees of a plant closure the Supreme Court has recently stated, "under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and *at a meaningful time* [emphasis supplied]." See *First National Maintenance Corp. v. NLRB*, 452 U.S. at 681-682.

Respondents cite *Triplex Oil Refining Division*, 194 NLRB 500 (1971),[4] in support of the contention that Respondents' invitation to the Union to bargain over the effects of the decision to close the O'Neill Meat Plant fulfilled Respondents' bargaining obligation under Section 8(a)(5), despite the fact that the invitation was issued after the actual closure and termination of the employees. In *Triplex Oil Refining* the Board concluded:

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[3] 221 NLRB 573, 576 (1975).

[4] *U.S. Contractors, Inc.*, 257 NLRB 1180 (1981), also cited by Respondents is completely inapposite to the instant situation. There, the respondent-employer *prior* to closing its business operations, met with the union and was prepared to bargain with the union about the effects of the closure, but the union, by virtue of its own conduct, precluded such bargaining.

> [A] representative of Respondent, asked an official of the Union to come down to the plant after the closing to make sure the terminated employees were satisfied with the benefits each received under the contract. The union official did so, and thus had an opportunity to seek negotiations on the effects of the closing. As the Respondent fulfilled its bargaining obligation by affording the Union this opportunity, it cannot be faulted for the Union's failure to present any demands.

The *Triplex Oil Refining* decision, insofar as it stands for the proposition that an employer can satisfy its obligation under 8(a)(5) to bargain over the effects of a plant closure by inviting the union to bargain after the plant has been closed and the employees terminated, stands alone, and is inconsistent with the great weight of authority set forth above, in particular with the Supreme Court's admonition in *First National Maintenance* that "under 8(a)(5), bargaining over the effects of a decision must be conducted . . . at a meaningful time." In any event, the instant case is significantly different from *Triplex Oil Refining*. There the employer recognized the union as the employees' collective-bargaining representative and the union had no reason to doubt that the employer's invitation to bargain was expressed in good faith. In the instant case, Respondents, by their own conduct, created a situation calculated to cause the Union to believe that Respondents did not intend to bargain in good faith over the effects of the decision to close the meat plant and that any attempt by the Union to secure good-faith bargaining would be futile. Thus, while inviting the Union to bargain over the effects of the closure, the Respondents, in the same breath, informed the Union that the Respondents were still refusing to recognize and bargain with the Union as the employees' exclusive collective-bargaining representative. Respondents took the position that they were not obligated to bargain with the Union about anything, including the effects of the clo-

sure upon the employees, since the Union did not represent the employees. In this situation the Union was reasonable in believing that it would have been futile to accept Respondents' after-the-fact invitation to bargain about the effects of the plant closure. For, "an employer who takes the erroneous position that a particular subject matter is not bargainable can hardly approach the discussion of this subject with an open mind and a willingness to reach an agreement." *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (1st Cir. 1953). Moreover, as Judge Schmidt found in Cases Nos. 32-CA-848 and 32-CA-928, Respondents had previously bargained in bad faith with the Union over the effects of the previous closure of the O'Neill Meat Plant in November 1977, and when the Plant was reopened in December 1977 Respondents repudiated the Union's collective-bargaining agreement, unilaterally changed the terms and conditions of employment of the employees represented by the Union, refused to bargain with the Union, and in order to avoid recognizing and bargaining with the Union, refused to reemploy the majority of the employees represented by the Union who were employed at the meat plant prior to the closure. Under the foregoing circumstances, the Union's failure to accept Respondents' invitation to engage in effects bargaining after the plant was already closed and the employees terminated was the foreseeable result of Respondents' own illegal conduct.[5]

Based upon the foregoing I find that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union with respect to the effects on the employees represented by the Union of Respondents' clo-

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[5] For the same reasons I reject Respondents' argument that the Union waived any representational claim by its failure to engage in negotiations with Respondents following Respondents' December 26, 1979 letter agreeing to bargain with the Union for a collective-bargaining agreement "to cover a bargaining unit if one should come into existence."

sure on February 18, 1981, of the O'Neill Meat Plant located at 2356 South Fruit Avenue, Fresno, California.[6]

Respondent O'Neill, an individual, argues that he has been improperly named as an individual respondent in this proceeding. In Cases Nos. 32-CA-848 and 32-CA-928, Judge Schmidt concluded that Respondent O'Neill was the alter ego of Respondent O'Neill, Ltd. and its subsidiaries and that Respondent O'Neill was individually responsible for remedying the unfair labor practices found to have been committed in that proceeding. In reaching this conclusion, Judge Schmidt found that Respondent O'Neill was the dominant figure in the formulation of the illegal scheme whereby the O'Neill Meat Plant closed in November 1977 and reopened in December 1977 under the auspices of new operators in order to avoid having to continue to comply with the Union's collective-bargaining agreement and to get rid of the Union and, further, found that the new business enterprises which had taken over the operation of the meat plant when it reopened were mere fronts for Respondent O'Neill and that, in the absence of moneys from Respondent O'Neill and his enterprises, the new enterprises were unable to operate the meat plant. In view of these circumstances, Judge Schmidt concluded that in the absence of imposing liability upon Respondent O'Neill for the unfair labor practices committed therein, it was unlikely that an effective remedy could be fashioned. In the instant proceeding there is no evidence that Respondent O'Neill's role in the operation of the meat plant has changed in any way. In other words, while certain of the Respondents herein appear to be the operators of the meat company, it is Respondent O'Neill who is the dominant figure and that without the infusion of his mon-

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[6] Respondents' argument that Section 10(b) of the Act bars this proceeding is without merit inasmuch as the charge was filed on March 10, 1981 well within 6 months of the plant closure which took place on February 18, 1981.

eys the plant could not operate. Since this state of affairs came about because of Respondent O'Neill's illegal scheme to get rid of the Union, I find that, as was the case in Cases Nos. 32-CA-848 and 32-CA-928, Respondent O'Neill was properly named as one of the Respondents and is responsible for remedying the unfair labor practices.

CONCLUSIONS OF LAW

1. During the time material, Respondents Edwin R. O'Neill; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc., have been a single employer for purposes of the Act in connection with the operation of the O'Neill Meat Plant and constitute a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Butchers' Union Local No. 126, United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clericals, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. During the time material herein the Union has been the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union about the effects upon the employees of the closing of the O'Neill Meat Plant on February 18, 1981, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that Respondents cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

As a result of the Respondents' unlawful failure to bargain about the effects of the closing of the O'Neill Meat Plant, the displaced employees represented by the Union have been denied an opportunity to bargain through their collective-bargaining representative at a time when Respondent was still in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order, therefore, cannot serve as an adequate remedy for unfair labor practices committed.

Accordingly, I deem it necessary, in order to effectuate the purposes of the Act, to require the Respondents to bargain with the Union concerning the effects of the closing of the O'Neill Meat Plant on its employees, and shall accompany this recommended order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondents. I shall do so in this case by requiring Respondents to pay backpay to its employees in the manner similar to that required in *Transmarine Navigation Corporation,* 170 NLRB 389. Thus, the Respondents shall pay employees backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this decision until the occurrence

of the earliest of the following conditions: (1) the date the Respondents bargain to agreement with the Union on those subjects pertaining to the effects of the plant shutdown on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or commence negotiations within 5 days of Respondents' notice of its desire to bargain with the Union; or, (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he or she would have earned as wages from February 18, 1981, the date Respondents closed the O'Neill Meat Plant, to the time he or she secured equivalent employment elsewhere, or the date on which Respondents shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

On these findings of fact and conclusions of law and on the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[7]

ORDER

Respondents, Edwin R. O'Neill, An Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc.; Fresno, California, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[7] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections thereto shall be deemed waived for all purposes.

(a) Failing and refusing to bargain collectively concerning the effects of the closure of the O'Neill Meat Plant on employees with Butchers' Union Local No. 126, United Food and Commercial Workers, AFL-CIO, as the exclusive representative of all employees in the following appropriate unit:

> All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clericals, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Pay the terminated employees in the above-described appropriate bargaining unit their normal wages for the period set forth in the remedy section of this decision plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) Upon request, bargain collectively with the above-named labor organization with respect to the effects on the employees in the appropriate bargaining unit of the closure of the O'Neill Meat Plant, and reduce in writing any agreement reached as the result of such bargaining.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail an exact copy of the attached notice marked "Appendix"[8] to Butchers' Union Local No. 126, United Food and Commercial Workers, AFL-CIO, and to all the employees who were employed at the O'Neill Meat Plant on February 18, 1981. Copies of said notice on forms provided by the Regional Director for Region 32, after being duly signed by Respondents' authorized representatives, shall be mailed immediately on request as hereinabove directed.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply herewith.

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[8] If this Order is enforced by a Judgment of a United States court of appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 90-70643, 90-70645.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 126,
Intervenor,

v.

EDWIN R. O'NEILL, an individual; O'NEILL, LTD., et. al,
Respondents.

Argued and Submitted Feb. 12, 1992.
Decided June 5, 1992.

Paul Hitterman and Howard E. Perlstein, N.L.R.B., Washington, D.C., for the petitioner.

Robert M. Cassel, Sullivan, Roche & Johnson, San Francisco, Ca., for respondents.

David A. Rosenfeld Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, Ca., for intervenor.

On Application for Enforcement of an Order of the National Labor Relations Board.

Before: FLETCHER, D.W. NELSON, and FERNANDEZ, Circuit Judges.

D.W. NELSON, Circuit Judge:

OVERVIEW

The National Labor Relations Board ("NLRB") petitions for enforcement of two of its orders. In case no. 90-70643, the NLRB petitions for enforcement of an order designed to compensate the Butchers' and Teamsters' Unions for unfair labor practices that occurred when Edwin O'Neill closed his meat plant in 1977 and then abruptly reopened it under the auspices of four new corporations just three weeks later. Case no. 90-70645 concerns unfair labor practices that resulted from the plant's permanent closing in 1981. O'Neill contends that the NLRB erred in holding that the unfair labor practices charges at issue in case no. 90-70643 were not time-barred, in finding that the new corporations were alter egos of the corporations formerly in existence at the plant, and in holding him individually liable for the unfair labor practices. We affirm the orders of the NLRB in both cases.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are long and complicated. The issues in this dispute all relate to the closing and subsequent reopening of a meat processing plant in Fresno, California, in 1977. O'Neill Meat Co. was formed in 1949 and Edwin O'Neill personally assumed control in the late 1960s. O'Neill owned 91% of the stock in O'Neill Meat Co.

In the mid 1970s, O'Neill Meat Co. began to experience severe losses. Accordingly, O'Neill decided to undertake an unpublicized reorganization of his company. O'Neill Meat Co. was renamed "Food Equipment Leasing Co." (hereinafter "FELC"). A wholly owned subsidiary of FELC entitled O'Neill Meat Company (hereinafter "OMC") was formed to operate the plant. OMC took responsibility for the production employees and union contracts formerly held by O'Neill Meat Co. Finally, a previously dormant corporation called O'Neill Ltd. was reactivated to assume the

management functions of the plant.[1] Under the new organization, OMC leased the plant and its equipment from FELC and operated the plant; O'Neill Ltd. performed administrative and bookkeeping functions for OMC. All former FELC employees were also transferred to the payrolls of either OMC or O'Neill Ltd. O'Neill Ltd. became a holding company for FELC, holding 91% of its stock. The net result of this combined enterprise was an organization responsible for feeding and slaughtering cattle, and supplying beef to various stores in California.

At the same time that O'Neill was reorganizing his business, he began to rethink his relationship with the Butchers and Teamsters Unions. O'Neill had previously had a long and peaceful relationship with both unions. In 1975, however, O'Neill retained the services of a labor consultant. In February 1976, O'Neill allegedly threatened some plant supervisors with the loss of their jobs if they did not resign their union memberships. In the fall of 1976, before the reorganization, O'Neill and the unions negotiated new collective bargaining agreements which called for yearly wage increases despite the company's growing financial problems. O'Neill also proposed a four-day workweek, but the unions refused to agree to the proposal.

Despite the reorganization, O'Neill's company continued to lose money in 1977. Accordingly, on October 26, 1977, O'Neill informed his employees that he intended to close the plant. O'Neill blamed his decision on both longstanding drought conditions and the cheaper labor that was available to meat processors in the Midwest.[2] By November 23, all employees had been laid off from the plant. O'Neill met with the unions on both November 8 and December 8 to discuss the effects of the plant closing.

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[1] Edwin O'Neill owned 94% of O'Neill Ltd.

[2] The NLRB argues that O'Neill's decision was prompted at least in part by his failure to obtain wage and workweek concessions from the unions.

At the December 8 meeting O'Neill and his representatives asserted to the unions that the plant closure should be considered permanent and that O'Neill had no intention of returning to the meat packing business.[3] When the union's attorney inquired if there was a possibility of leasing the facility, O'Neill's attorney responded that he was trying to arrange a lease, but in reality a lease between OMC and an entity called Fresno Beef Packers ("FBP") had already been executed on December 1. O'Neill's attorney also stated that the closing decision might be reconsidered if the Butchers were willing to make some concessions. However, on December 12, the plant did in fact reopen under the auspices of four new corporations.[4]

Each corporation handled a portion of OMC's former business. The FBP company was responsible for leasing the plant from FELC and slaughtering the cattle. The Don Turner Corporation (DTC) provided the labor used for slaughtering operations. The Sierra Pacific Meat Company (SPM) procured the cattle and brokered the finished product. The JET company transported the finished product using trucks leased from FELC. O'Neill Ltd. provided accounting and bookkeeping services, and yet another Edwin O'Neill-owned company, O'Neill Cattle Feeding Co. (OCF), supplied the cattle.

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[3] The NLRB points to several pieces of evidence indicating that O'Neill did indeed know that the plant's closing would be brief. For example, ten days before the closing, the president of OMC instructed the plant superintendent to tell supervisors that they would be "taken care of." Salesmen were also instructed to tell customers that the plant would not be closed long.

[4] Many of the employees hired for the new operation were former OMC employees. The employees were hired on the condition that they work on a non-union basis. Indeed, the NLRB found that one of the companies, the Don Turner Corporation, specified that no more than forty percent of its hires could be former OMC employees, so that the employees would be unable to vote the union back into the plant.

For the purposes of this discussion, several facts associated with the formation of the four new companies are significant. First, all were incorporated in late November and early December. Second, the owners of each company had previous relationships with both O'Neill and the meat plant. Third, all the companies had very small capitalizations, ranging from $ 1000 to $ 5000. Fourth, none of the companies secured a line of credit from a bank prior to the commencement of operations. Finally, the same lawyer handled the incorporation of three of the companies.

O'Neill and his representatives held another meeting with the Butchers on January 19, 1978. The Butchers inquired about the reopening of the plant and O'Neill's interest in the various companies. The facts are sketchy about what information was given to the union at this meeting, but it appears that O'Neill did not volunteer the information that he was involved with any of the companies. At that time, the Butchers also told O'Neill that they were filing a grievance against OMC over the plant's closing.

On April 12, 1978, the Butchers filed unfair labor practice charges (ULPC) against OMC.[5] Following an investigation, the NLRB dismissed the charges because of a lack of evidence that O'Neill owned or controlled the new companies. The Butchers filed an appeal of the dismissal; the Teamsters did not. On October 5, 1978, the Regional Director of the NLRB received a letter from the Butchers stating that they had new information relevant to the previously dismissed charges.[6] On November 21, the Regional Director notified the parties that the Butchers' charges had been reinstated. On January 30, 1979, the Regional Director issued a complaint on the Butchers' charges, and

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[5] The Teamsters followed suit on May 11.

[6] The key piece of information was an affidavit from a former company officer outlining O'Neill's involvement in the new corporations.

on April 27, he issued an amended complaint that consolidated the Teamsters' and Butchers' charges.

On March 3, 1982, an administrative law judge issued his initial decision, finding that O'Neill and his companies had committed unfair labor practices by terminating and refusing to reinstate union members, by repudiating the union agreements in effect at OMC, and by refusing to bargain in good faith. On August 1, 1985, the NLRB remanded the case to the ALJ to determine whether the complaint should be dismissed as barred by a six-month statute of limitations because of the NLRB's 1985 decision in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), *enforced*, 785 F.2d 304 (4th Cir. 1986). The ALJ found that the statute of limitations had been tolled because of O'Neill's fraudulent concealment of the operative facts underlying his violations. On May 31, 1988, the NLRB adopted the ALJ's findings that the complaint was not time-barred and that O'Neill was the alter ego of all other respondents in the case and thus was individually liable for their unfair labor practices. This appeal for enforcement of the NLRB's orders followed.[7]

STANDARD OF REVIEW

Decisions of the NLRB will be upheld on appeal if the NLRB's findings of fact are supported by substantial evidence and if it has correctly applied the law. *NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1290 (9th Cir. 1989). "The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record." *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir. 1987). Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*,

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[7] The plant ceased operations permanently on February 18, 1981. The Butchers again were not given the opportunity to bargain about the effects of this closing.

402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126 (1938)).

DISCUSSION

1. Timeliness of the Reinstated Charges

Section 10(b) of the National Labor Relations Act ("NLRA") provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b).[8] In *Ducane Heating Corp.*, 273 NLRB 1389, the NLRB held that a dismissed charge may not be reinstated outside of the original six month statute of limitations period, unless the employer has fraudulently concealed material facts underlying the alleged violations. "Where there is fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts." *Id.* at 1390. Thus, if a defendant has intentionally deceived a charging party with respect to the evidence necessary for the charging party to prove its case, *Ducane's* fraudulent concealment exception allows for reinstatement outside of the six month statute of limitations. In this case, the events giving rise to the unfair labor practices occurred in December 1977 and the charges were not reinstated until November 1978. O'Neill contends that the unions' charges are time-barred because the unions knew of the concealed facts at the latest by April 12, 1978, when they filed unfair labor practice charges. The NLRB responds that the statute of limitations was tolled until September 21, 1978, when the unions received the testimony of a recently-indicted com-

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[8] As a preliminary matter, we note that the statute of limitations question is relevant only to our consideration of the first NLRB order, for which the NLRB seeks enforcement in No. 90-70643. This order dealt with the effects of the closing and reopening of the plant in 1977. The second NLRB order, the subject of docket No. 90-70645, was directed toward the effects of the final closing of the plant in 1981.

pany official that O'Neill was heavily involved in the new corporations.

The NLRB has not yet set out a definitive standard for what constitutes "fraudulent concealment of material facts." *International Ass'n of Machinists v. NLRB*, 949 F.2d 441, 449 (D.C. Cir. 1991). In general, a party who wishes to invoke the doctrine of fraudulent concealment must establish "(1) fraudulent concealment by the party raising the statute [of limitations] together with (2) the other party's failure to discover the facts which are the basis of his cause of action despite (3) the exercise of due diligence on his part." *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 383 n.2 (9th Cir.) (citing *Charlotte Telecasters v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976)), *cert. denied*, 444 U.S. 940, 100 S. Ct. 293, 62 L.Ed.2d 306 (1979). To establish the element of fraudulent concealment, the NLRB points to the finding below that "O'Neill's entire scheme was marked by efforts at concealing the operative facts regarding the closing and reopening of the meat plant." The NLRB also notes that O'Neill made misrepresentations at the December 8, 1977, meeting with the Butchers when he told them the closing was permanent and that the plant had not yet been leased. The Board also argues that the deception continued when O'Neill's employees slid papers under the doors of offices to convey the impression that the businesses were separate and kept the office doors of the different companies locked.

We agree with the NLRB that the fraudulent concealment exception is applicable in this case. O'Neill's argument that the statute of limitations clearly began running on April 12 when the unions filed unfair labor practice charges is not persuasive. If the fact of filing charges were alone sufficient to trigger the statute of limitations, then there would be no need for the fraudulent concealment exception to *Ducane*. The relevant inquiry in deciding whether to allow reinstatement is not when the original charges were filed, but whether the defendant fraudulently

concealed "the operative facts underlying the alleged violation." *Ducane*, 273 NLRB at 1390. In this case, substantial evidence supports the NLRB's finding that O'Neill repeatedly and fraudulently attempted to conceal the operative facts regarding the closing and reopening of the meat plant.[9] Moreover, O'Neill maintained his fraudulent course of conduct when he continued to obscure his substantial involvement in the operations of the new corporations. The fact that the NLRB initially dismissed the charges and reinstated them only after learning of the officer's testimony clearly indicates that the testimony was a critical and material piece of information. Because O'Neill fraudulently concealed material facts and because the unions themselves were diligent in filing and investigating their charges, we find that the unions' charges are not time-barred. *See Strawsine Manufacturing Co.*, 280 NLRB 553, 553 (1986) (finding a charge timely under *Ducane* because the employer had concealed facts about the closing of a plant). The statute of limitations did not begin running until September 21, 1978.

Because we conclude that the unions' case is not barred by *Ducane*, we next consider O'Neill's contention that a number of procedural defects bar application of the fraudulent concealment doctrine in this case. First, O'Neill contends that the NLRB was without authority to hear the

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[9] For example, O'Neill structured the new companies in such a manner as to convey the impression that he had no financial stake in their performance and no control over their activities, whereas in fact he remained the central figure in their operations. He also told the unions at the December 1977 meeting that he was going out of the meat packing business and that the new plant had not yet been leased, when he was at that time actively coordinating the formation of the new corporations and had already leased the plant. Furthermore, at the January 1978 meeting O'Neill again sought to deceive the unions by declaring, in direct response to a question put to him by one of the union attorneys, that he had no involvement with the new meat packing operations and thereafter continued to attempt to foster the illusion of separate entities.

complaint because the unions did not appeal the Regional Director's initial dismissal of their unfair labor practice charge or move for reconsideration before the General Counsel. This argument is without merit. 29 C.F.R. § 102.19(a) and (c) give the unions a *right* to appeal or move for reconsideration. They do not, however, preclude the General Counsel or the Regional Director from reinstating a charge on his own authority. *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1106 n.4 (1983) (failure to appeal dismissal did not bar reinstatement of new charge). In *Ducane*, for example, the Regional Director reinstituted *sua sponte* a complaint he had previously dismissed. The NLRB reversed on the grounds that the complaint was reinstituted after the period established by section 10(b). The Board clearly assumed, however, that the Regional Director had the authority to reinstate a charge on his own motion. *See California Pacific Signs, Inc.*, 233 NLRB 450, 451 (1977) ("once a charge has been timely filed, the control over, and disposition of, that charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act. The General Counsel thus has virtually unlimited discretion to proceed on such timely filed charges as he deems fit").[10] The unions' failure to appeal or file a motion for reconsideration does not bar the General Counsel or the Regional Director from reinstating a complaint on their own motion.

O'Neill also contends that the ALJ and the NLRB should not have considered the issue of fraudulent concealment at all because it was not raised in the amended consolidated complaint or in the ALJ's first opinion. This argument also lacks merit. The General Counsel filed the

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[10] *California Pacific* was overruled in *Ducane* insofar as it held that the General Counsel had discretion to exceed the time limits imposed by section 10(b). However, *Ducane* did not strip the General Counsel of his power to reinstate charges on its own motion within the six month limit of section 10(b).

amended consolidated complaint on April 27, 1979. The ALJ issued his initial opinion on March 30, 1982. *O'Neill*, 288 NLRB 1354, 1359 (1988) (reproducing ALJ slip opinion). At the time the complaint was filed and the opinion was issued, the NLRB did not require proof of fraudulent concealment in order to reinstate timely filed complaints. *California Pacific Signs, Inc.*, 233 NLRB 450 (1977). The ALJ relied on this case in concluding that the complaint was timely. *O'Neill*, 288 NLRB at 1381-83.

In 1985, the NLRB overruled *California Pacific* in *Ducane*. The NLRB then remanded this case to the ALJ for reconsideration in light of *Ducane*.[11] On remand, the parties briefed the issue of fraudulent concealment and entered into a stipulation of the facts relating to O'Neill's fraudulent concealment. Based on this evidence, the ALJ found that O'Neill had fraudulently concealed facts from the unions and the General Counsel, and that the time limit of section 10(b) was therefore tolled until the true facts were discovered.

It therefore appears that the General Counsel presented evidence and argument on the issue of fraudulent concealment as soon as the issue arose—that is, in 1985. The ALJ did in fact make findings on the issue in his supplemental decision. O'Neill's assertion that no such evidence was presented is flatly contradicted by the record. We therefore conclude that the NLRB is entitled to have this court consider its fraudulent concealment arguments on the merits.

Finally, O'Neill contends that the charges against him as an individual should be dismissed because he was not added as a party until January 22, 1979, more than six months after the violations occurred. We reject this ar-

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[11] *Ducane* is retroactive, and therefore applies in this case even though it began long before *Ducane* was decided. *International Ass'n of Machinists*, 949 F.2d 448 at 448-49.

gument as well. In the first place, the ALJ found that Edwin O'Neill and the corporations charged in the first complaint were alter egos. *O'Neill,* 288 NLRB at 1378. Where two parties are alter egos, service on one is sufficient to initiate proceedings against both within the statute of limitations. *BMD Sportswear Corp.,* 283 NLRB 142, 142 n.1 (1987); *Sturdevant Sheet Metal & Roofing Co.,* 238 NLRB 186, 187 (1978), *enforced,* 636 F.2d 271 (10th Cir. 1980); *see also Associated Gen. Contractors v. NLRB,* 929 F.2d 910, 915 (2d Cir. 1991) (derivative liability may be imposed on alter egos "without regard to the fact that the limitations period has expired").

In any event, the NLRB clearly made findings that O'Neill individually engaged in fraudulent concealment, thereby tolling the statute of limitations until September 21, 1978. *O'Neill,* 288 NLRB at 1355. Even if the section 10(b) limitations period did apply to O'Neill as an individual, therefore, the period is tolled because of O'Neill's fraudulent concealment.

2. Finding of Alter Ego

The ALJ and the NLRB both found that prior to November 1977 OMC, O'Neill Ltd., and FELC constituted a single employer operating the O'Neill meat plant. Furthermore, they found that the post-November corporations of SPM, FBP, JET, and DTC were the alter egos of this single employer. Moreover, they concluded that the new entities were created in an attempt to circumvent O'Neill's obligations to the unions. Therefore, the Board found that O'Neill and his companies constituted a single employer liable for the unfair labor practices committed in conjunction with the initial closing, reopening, and the eventual permanent closing of the plant.

" 'The focus of the alter ego test . . . is on the existence of a disguised continuance of the same business or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical

change in operations." *Haley & Haley v. NLRB*, 880 F.2d 1147, 1149-50 (9th Cir. 1989) (quoting *Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518 (9th Cir. 1989). We consider four factors in determining whether entities are alter egos of one another: "(1) centralized control of labor operations, (2) common management, (3) interrelation of operations, and (4) common ownership and financial control." *J.M. Tanaka Constr. Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982). No factor is controlling and all need not be present. "In addition, the determination that one entity is merely another's alter ego will depend to some extent on whether or not the transfer of assets or the dissolution of the old entity is motivated by union animus." *Haley*, 880 F.2d at 1150. Finally, "[a] conclusion by the Board that two corporations are alter egos is essentially factual and may not be disturbed if, looking at all the evidence, substantial evidence supports the determination." *Tanaka*, 675 F.2d at 1033.

The single most important factor in the analysis is centralized control of labor relations. *Id.* at 1034. As evidence that O'Neill controlled the labor relations of the four new corporations, the NLRB points to the facts that O'Neill instructed two former OMC employees to work for one particular corporation, that he directed an FBP engineer to make certain changes to the plant, and that he recruited the new general manager for SPM. In terms of relationships with the unions, the NLRB found that O'Neill Ltd.'s vice-president authorized raises for SPM staff, instructed the SPM general manager to lay off DTC staff, and that O'Neill himself made efforts to pressure the Butchers to stop picketing an SPM customer. Finally, the NLRB points out that former OMC employees who had angered management were not hired to work for any of the new companies upon reopening. These facts suggest that at least some control of labor relations was centralized in O'Neill.

As for common management, the NLRB found that O'Neill arranged for the lease of SPM's offices and re-

solved a dispute between an OMC and a DTC supervisor about laying off employees. Other O'Neill Ltd. employees ordered supplies for SPM, provided credit references for FBP, and monitored operations at the plant by preparing daily reports on operations. The NLRB also states that O'Neill Ltd. handled all of SPM's financial affairs. Some of the companies' managers also displayed very little interest in or involvement with their companies; the SPM manager did not even hire his own staff. Although this seems to constitute some evidence that O'Neill was at least involved with the management of plant operations, it does not seem to rise to the level of substantial evidence of control of the daily operations of the plant. *See Tanaka*, 675 F.2d at 1034 (finding alter ego in part because of shared control of daily operations). This factor standing alone would not seem to constitute substantial evidence that the businesses were alter egos.

However, the third factor, interrelation of operations, very strongly supports a finding of alter ego. The owner of SPM stated that O'Neill told him the companies evolved out of one another and were all dependent on each other. The companies leased equipment from one another, supplied each other with both raw materials and finished product, and in part operated out of the same facility.

In terms of the fourth factor, it is undisputed that O'Neill did not own any of the new companies and did not serve as an officer for any of them. However, all of the new companies had extremely thin capitalizations and O'Neill supplied one of them with nearly two million dollars worth of cattle without demanding payment. O'Neill also negotiated a line of credit for SPM and personally guaranteed its indebtedness. O'Neill also guaranteed FBP's lease payments and transferred money between various company accounts as needed. Moreover, FELC leased trucks to JET without requiring a security deposit and unilaterally raised lease payments at will. O'Neill's dem-

onstrated control of financial operations also strongly supports a finding of alter ego.

In response, O'Neill vigorously contests certain of the NLRB's factual findings relating to O'Neill's control of labor relations and the issue of centralized management, such as the circumstances surrounding the hiring of SPM general manager Burratto. O'Neill also argues that his company supplied only twenty-one percent of the beef that flowed through the new corporations during the first year, and thus it is unreasonable to believe the corporations existed solely for O'Neill's benefit. However, even eliminating the evidence relating to labor relations and centralized management, we believe that the evidence of interrelationship of operations and financial control, coupled with the unusual circumstances surrounding the corporations' formation, the evidence that OMC principals knew the plant closure would be brief, and the evidence of hostility toward labor, constitutes substantial evidence sufficient to support a finding of alter ego. The companies were undisputably intermingled and controlled to a significant extent by O'Neill and his original companies (OMC, O'Neill Ltd. and FELC). We affirm the NLRB's finding on alter ego because it is supported by substantial evidence.

3. Piercing the Corporate Veil

As discussed above, the ALJ and the NLRB concluded that the four corporations that reopened the meat packing plant were alter egos of the O'Neill enterprises that had previously operated the plant. However, they also found that Edwin O'Neill individually was the alter ego of all seven corporations and thus was personally liable for the unfair labor practices. Because the other companies are apparently now out of business, this means that Edwin O'Neill is personally responsible for satisfying what is by now a very substantial backpay award. Not surprisingly,

O'Neill vigorously contests the NLRB's decision to pierce the corporate veil.

The finding that the four new corporations were alter egos of the old corporations created to avoid OMC's collective bargaining obligations does not answer the question whether O'Neill himself should be individually liable. We begin our analysis of this separate question with the principle that "section 10(c) of the Act empowers the Board with broad authority to fashion appropriate remedies to meet the needs of a particular situation so that 'the victims of discrimination may be treated fairly.' " *Greater Kansas City Roofing,* 305 NLRB No. 89, at 1 (Nov. 25, 1991) (citing *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 61 S. Ct. 845, 85 L.Ed. 1271 (1941). Although "insulation of a stockholder from the debts and obligations of his corporation is the norm," there are exceptions to this general principle. *NLRB v. Deena Artware,* 361 U.S. 398, 402-03, 80 S. Ct. 441, 443, 4 L.Ed. 2d 400 (1960). We examine three factors in deciding whether to pierce the corporate veil: the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited upon the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators. *Seymour v. Hull & Moreland Engineering,* 605 F.2d 1105, 1111 (9th Cir. 1979).

It is clear that the second and third factors are satisfied in this case. O'Neill concedes that if he is not found individually liable the alleged discrimination will go unremedied. Moreover, because we concluded above that the companies were alter egos created to avoid collective bargaining obligations, the conclusion that the companies were created and incorporated with fraudulent intent is inescapable.

The evidence on lack of respect given to the separate identity of the corporation is more problematic. The NLRB does not claim that O'Neill mingled personal and corporate

monies or treated any of the corporation's assets as his own, which often constitutes the most serious evidence of disregard of the corporate form. *See, e.g., Seymour,* 605 F.2d at 1112. Moreover, the corporations did have officers and keep corporate records, which suggests the companies followed some corporate formalities. However, in other respects O'Neill showed little regard for the corporate form. He moved officers from one company to another, made decisions in the absence of board meetings, and sometimes failed to inform company directors that decisions had been made. He also personally guaranteed loans and clearly was involved in the decisionmaking processes of all the companies.

"When the incentive value of limited liability to corporations and their owners is outweighed by the competing values of basic fairness to parties dealing with a corporation, the Board should look past that corporation's formal existence and hold controlling individuals liable for 'corporate' obligations." *Greater Kansas City Roofing,* 305 NLRB No. 89, at 1. Other courts have recognized and endorsed the NLRB's policy of holding an individual personally liable for unfair labor practices when that individual participated in the decisionmaking that caused the ULP outside of the normal channels of corporate control. *See, e.g., Esmark, Inc. v. NLRB,* 887 F.2d 739, 757 (7th Cir. 1989). "The corporate veil will be pierced whenever it is employed to perpetuate fraud, evade existing obligations, or circumvent a statute. Thus, in the field of labor relations, the courts and Board have looked beyond organizational form where an individual . . . was in active concert or participation in a scheme or plan of evasion . . . ." *Riley Aeronautics Corp.,* 178 NLRB 495, 501 (1969). Because O'Neill was the driving force behind the creation of the different corporations, created the corporations with fraudulent intent and in an effort to avoid his labor obligations, and continued to participate actively in their operations, piercing the corporate veil in this case is justified.

CONCLUSION

The orders of the NLRB will be ENFORCED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 90-70643, 90-70645

NLRB NOS. 32-CA-848, 32-CA-928

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 126,
Intervenor,

v.

EDWIN R. O'NEILL, an individual; O'NEILL, LTD., et. al,
Respondents.

FILED

JUN 24 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: FLETCHER, D.W. NELSON and FERNANDEZ, Circuit Judges.

Respondents' motion for extension of time to file a petition for rehearing and suggestion for rehearing en banc is granted up to and including July 10, 1992.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 90-70643, 90-70645

NLRB NOS. 32-CA-848, 32-CA-928

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 126,
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v.

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Respondents.

FILED

NOV 4 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: FLETCHER, D.W. NELSON and FERNANDEZ, Circuit Judges.

The motion, filed July 10, 1992, for leave to file a revised Petition for Rehearing and Suggestion for Rehearing En Banc is granted, and said revised Petition for Rehearing and Suggestion for Rehearing En Banc is hereby deemed filed.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 90-70643, 90-70645

NLRB NOS. 32-CA-848, 32-CA-928

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 126,
Intervenor,

v.

EDWIN R. O'NEILL, an individual; O'NEILL, LTD., et. al,
Respondents.

FILED

DEC 8 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: FLETCHER, D.W. NELSON and FERNANDEZ, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.